THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 326/2018

In the matter between:

JOHANNESBURG SOCIETY OF ADVOCATES	**APPELLANT**
and	
CHRISTIAAN SERFONTEIN EDELING	**RESPONDENT**

Neutral citation: *Johannesburg Society of Advocates v Edeling* (326/2018) [2019] ZASCA 40 (29 March 2019)

Coram:	Ponnan, Wallis, Saldulker and Schippers JJA and Eksteen AJA
Heard:	22 February 2019
Delivered:	29 March 2019

Summary: Advocate - re-admission and re-enrolment – whether applicant a fit and proper person to be admitted as an advocate - applicant struck off the roll for serious dishonesty - needing to show genuine, complete and permanent reformation.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Modiba and Molahlehi JJ sitting as court of first instance):

1 The appeal is upheld with costs including the costs of two counsel.

2 The order of the court a quo is set aside and replaced by the following order:

'The application is dismissed with costs such costs to include the costs of two counsel.'

JUDGMENT

Wallis and Saldulker JJA (Ponnan and Schippers JJA and Eksteen AJA concurring):

[1] Mr Christiaan Serfontein Edeling, the respondent in this matter, presently 64 years old, was admitted as an advocate of the then Supreme Court of South Africa on 27 March 1979. He initially practised at the Johannesburg Bar and then joined the Free State Bar in 1984, where he practised until 1993. While there he was admitted as an advocate in Lesotho. He then re-applied to and was granted membership of the Johannesburg Bar and resumed his practice there.

[2] During March 1996, the Society of Advocates of South Africa, Witwatersrand Division (as the present appellant, the Johannesburg Society of Advocates (the Society), was then known) applied in terms of s 7 of the Admission of Advocates Act 74 of 1964, for Mr Edeling's striking off. On 11 December 1997 he was struck from the roll of advocates by order of the Witwatersrand Local Division (Van Der Merwe and Du Plessis JJ).[1] Aggrieved, Mr Edeling applied for leave to appeal against the judgment of the high court,

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[1] *Society of Advocates of South Africa (Witwatersrand Division) v Edeling* 1998 (2) SA 852 (W).

but it was refused. His applications for leave to appeal to the Supreme Court of Appeal and the Constitutional Court were also dismissed.

[3] In 2009, and again in 2015, Mr Edeling, brought *ex parte* applications before the Gauteng Division of the High Court of South Africa for his re-admission and re-enrolment as an advocate. The Society intervened and opposed both applications, the first of which was withdrawn at the Society's instance after the second application was launched. The court a quo (Modiba J, Molahlehi J concurring) granted Mr Edeling's application and made no order as to costs. The appellant applied for leave to appeal the order, which was refused by the court a quo with an adverse order of costs. This appeal is with the leave of this court.

The reasons for Mr Edeling's striking off

[4] Mr Edeling was struck off the roll largely in consequence of his dealings with Mr Glyn Rudolph. Mr Rudolph had devised a scheme under which properties were sold at vastly inflated prices, with payment being effected in terms of two promissory notes given by the purchaser to the seller. The first of these would be for the approximate value of the property. The second would be a wildly inflated figure payable many years in the future. The purpose of these arrangements was to secure a refund of VAT from the revenue authorities. In terms of one of these schemes Mr Edeling sold his own home in Bloemfontein, worth between R850 000 and R1 million, to Special Aircraft Utilisation (Pty) Ltd (SAU), a company effectively controlled by Mr Rudolph, for some R73 million. He also attempted to purchase a commercial property in Johannesburg, referred to as the St Margaret's property valued at R2.5 million, for R120 million under a similar scheme, but this fell through. Instead SAU purchased the property for R158 million, to be discharged by way of two promissory notes.

[5] When Rudolph told him that there were problems in regard to the purchase of the St Margaret's property, Mr Edeling drafted an agreement, the Condor agreement, with a view to circumventing those problems. This involved a trust that he had formed in Lesotho, controlled by him and an attorney, Mr

Redelinghuys. The purpose of the agreement was to acquire the interests of the seller of the St Margaret's property in a manner that would ensure that it would never be necessary to satisfy the second inflated promissory note. This was to be concealed from the revenue authorities. When the purchases by SAU of Mr Edeling's home and the St Margaret's property were considered in the Special Income Tax Court, Mr Edeling gave evidence in support of their legality. Melamet J held that both schemes were fraudulent and that Mr Edeling perjured himself in giving his evidence.

[6] On 11 December 1997 the high court concluded with regard to the first transaction that the sale by the respondent of his house in Bloemfontein was not a true sale, but a simulated transaction entered into solely to obtain a tax advantage to which the parties were not entitled. This finding implied that Mr Edeling had not been truthful in his evidence to either the Special Court or the court hearing the striking off application. With regard to the second intended transaction the high court concluded that the offer to purchase the St Margaret's property was a simulated transaction employed solely to obtain an unconscionable tax benefit to which the parties were not entitled. It was not genuine and was intended as a fraud on the *fiscus.* The high court analysed the Condor transaction in some detail and concluded that it showed that Mr Edeling had been untruthful in regard to his relationship with Rudolph; that he was aware that the two transactions were simulated; and that his evidence at a number of points was untruthful. That was also its conclusion in regard to the evidence given in the Special Court.

[7] In his counter-application Mr Edeling attacked a number of senior members of the Johannesburg Bar in the most intemperate and insulting terms without any justification whatsoever. The court concluded that the insulting statements made by Mr Edeling in his counter-application concerning the Society, its Bar Council and certain of its members were not true. The high court viewed these allegations in a serious light, and held that they were particularly serious, when made of officers of the court whose honesty and integrity had to be beyond question. It concluded that it was clear that the

insulting statements were self-serving and evidence of an attempt by the respondent to discourage full and proper investigation into his conduct.

[8] The high court concluded that he was not a fit and proper person to practise as an advocate. It ordered that his name be struck from the roll of advocates. It held that Mr Edeling had been party to dishonest and simulated transactions and that the 'moment he perceived the vulnerability in the VAT Act, he waded in and exploited it to the hilt'. He displayed a lack of judgment, which was revealed by his inability to perceive that he had done anything wrong. Even in court he had no qualms about the morality of his conduct. There is no need to go further into the details of the findings of the court of which these are a summary. Its final conclusion was that Mr Edeling's evidence overall was a combination of half-truths and lies; facts had been withheld; full disclosure had not been made; and he had concealed the whole truth. These were resounding findings of dishonesty.

The applications for re-admission

[9] In 2009 Mr Edeling launched an application for his re-admission (the 2009 application), which was eventually withdrawn and he had to pay the costs. One of the primary grounds of opposition by the Society was that he had failed to make a full and honest disclosure to the court, especially in regard to his having resumed practice as an advocate in Lesotho. The application dragged on for a number of years until he brought the present application for his re-admission in 2015, before withdrawing the 2009 application. In regard to that application the respondent says in his present founding affidavit:

'By that time I had already built a good practice in Lesotho and had no appetite for further confrontation with the Johannesburg Bar, which I wished to join should I be readmitted. I knew that I was once again a fit and proper person and was busy proving as much in Lesotho. I decided to let the matter lie for a few years, in the hope that old resentments would die down, and in the hope that I might later make a new application after I had once again built a sound reputation as an advocate in Lesotho.'

[10] When, in June 2015, Mr Edeling renewed his application for his re-admission as an advocate, he said in his founding affidavit in support of this application inter alia:

'I respectfully submit that in considering my application for readmission this Honourable Court will ask itself simply whether I am now, as at the time of the hearing a fit and proper person to practise as an Advocate. I submit that the court will not approach the matter as if these were punitive proceedings and that the Court will not seek to mete out any further punishment for the sins I committed nearly 20 years ago. I believe that I have atoned for my sins and learned from my mistakes. In the course of my work in recent years, I have conducted myself in a proper and professional manner. There have been no complaints against me or concerning my conduct . . . I believe that I have learned from the lessons of the past. I have changed my attitude and my conduct for the good . . . *The events leading to the removal of my name from the roll of Advocates bear upon the conduct of my personal and private tax affairs and a bad relationship with certain members of the Johannesburg Bar, and not with the manner in which I performed my professional duties to any of my clients or the Court*.' *(*Emphasis added.)

[11] Where a person who was previously an advocate has been struck-off the roll of advocates on the basis that he is not fit and proper to practise as an advocate, and then applies for re-admission, the court adopts the following approach:

'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. 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.'[2]

Like any other applicant for admission as an advocate, Mr Edeling had to show no more than that he was a fit and proper person to be admitted, but he had to discharge that onus against the background of the past conduct that had exposed serious character flaws relating to his integrity.

[12] In his detailed founding affidavit in this application, Mr Edeling said that he accepted the findings of the high court that his conduct was wrong and it justified the order striking his name from the roll of advocates. However, he did not explicitly and in so many words acknowledge that he had been dishonest; had engaged in dishonest transactions directed at obtaining tax advantages to which he and his associate, Mr Rudolph were not entitled; made misrepresentations to the revenue authorities; intended to conceal the true nature of these transactions from the revenue authorities and lied to both the Special Income Tax Court and the court hearing the application for his striking off. He proffered the following explanation for concluding the simulated and dishonest transactions:

'**My explanation for concluding the transactions**

32 As appears from the judgment, my explanation at the time was;

32.1 The VAT scheme was lawful;

32.2 There is no room for considerations of equity or morality in matters relating to tax. Since the scheme was lawful there was no need to consider other considerations.

32.3 *I gave no false evidence*;

32.4 *There was no fraud on the fiscus, and no misrepresentations were made to the Receiver of Revenue*.

32.5 I was dissatisfied with the manner in which certain members of the Bar Council had acted in regard to my matter, and exercised what I believed were my rights to challenge the conduct.

33. I no longer hold those views which I fought so strenuously at the time to be upheld, and now realise that they were naïve and ill considered. However, *such views were my genuine bona fide views held by me at the time*. . . .' (Emphasis added.)

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[2] *Swartzberg v Law Society of the Northern Provinces* [2008] ZASCA 36*;* 2008 (5) SA 322 (SCA) para 22. See also *Law Society, Transvaal v Behrman* 1981 (4) SA 538 (A); *Kudu v Cape Law Society* 1977 (4) SA 659 (A); *Ex parte Knox* 1962 (1) SA 778 (N) at 782D-784G; *Ex Parte Aarons (Law Society, Transvaal, Intervening)* 1985 (3) SA 286 (T).

[13] The statement in the second sentence in para 33 that 'such views were my genuine bona fide views held by me at the time', was incompatible and irreconcilable with his statement that he accepted the 'findings of the court and that my conduct was wrong and fully justified the order striking my name from the roll of Advocates'. Mr Edeling was held to have entered into simulated transactions and been aware that they were simulated. That being so he could not genuinely and bona fide have held the view that they were not simulated, were not a fraud on the *fiscus* and involved no misrepresentations to the Receiver of Revenue. Both the Special Court and the high court held that he repeatedly and in a number of different respects lied under oath. If one is lying under oath, one cannot at the same time genuinely and bona fide believe that one is telling the truth. Either Mr Edeling had no insight into the fundamental dishonesty of his previous conduct or believed it to have been excusable, or he was lying about his state of mind at the time. None of that was compatible with his claimed acceptance of the findings of the high court and his having acquired insight into his deficiencies and overcome the flaws in his character that the high court exposed.

[14] To bolster his application to be re-admitted Mr Edeling relied on character references from some six persons, all of which were dated either 2008 or 2009, including one from his wife and one from his attorney. Most of the references were unhelpful and meaningless, because all they did was paint a favourable picture of Mr Edeling, without indicating the extent of their knowledge of Mr Edeling's wrongdoings or whether they knew about the personality traits or character defects which gave rise to his misdeeds and led to his striking off. None referred to the fact that dishonesty lay at the root of the decision to strike him from the roll of advocates. In regard to similar character references Wessels JP said in *Ex parte Wilcocks*:[3]

'It is not sufficient to produce before the Court a few certificates from interested friends or to say that he has led an honest life. The evidence with regard to that must be overwhelming: the Court must be satisfied that it will make no mistake if it reinstates the applicant.'

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[3] *Ex parte Wilcocks* 1920 TPD 243 at 245.

[15] One of the reports was from a psychologist, Ms Robyn Fasser, who Mr Edeling consulted on two occasions. She described Mr Edeling's character, his failure to come to terms with his past misdeeds, and to take responsibility for his wrongdoings in the following paragraph:

'With respect to positive impression management, his pattern of responses suggests that he tends to present himself in a consistently favourable light, and as being relatively free of common shortcomings to which most individuals will admit. He appears reluctant to acknowledge personal limitations and will tend to repress or deny distress or other internal consequences that might arise from such limitations. This tendency will likely lead him to minimize, or perhaps even be unaware of, problems or other areas where functioning might be less than optimal.'

[16] Ms Fasser's opinion was prescient, precisely indicating that Mr Edeling had not, albeit that a number of years had passed since his striking off, accepted that the transactions in which he was involved in were dishonest, fraudulent and an endeavour to defraud the revenue. Her summary of his explanation of his conduct reflected that he thought he was acting lawfully and exploiting a loophole in the tax legislation and not that he was acting fraudulently. Furthermore her report did not state that Mr Edeling had come to terms with his dishonesty, addressed it and remedied it, and therefore undergone a permanent reformation. Although Ms Fasser's report was formulated in 2008 there was nothing in the present application to suggest that Mr Edeling's insight into and perception of his past failings had altered in the intervening years.

[17] An advocate is required to be completely honest, truthful and reliable.[4] In applications such as these the Society acts as the *custos morum* of the profession. In doing so it acts in the interests of the profession, the court and the public. It was contended on behalf of the Society that the respondent did not disclose matters germane to the question of his re-admission as an

[4] *Swain v Society of Advocates, Natal* 1973 (4) SA 784 (A) at 790G-791A; *General Council of the Bar of South Africa v Geach and Others; Pillay and Others v Pretoria Society of Advocates and Another; Bezuidenhout v Pretoria Society of Advocates* [2012] ZASCA 175; 2013 (2) SA 52 (SCA); [2013] 1 ALL SA 393 (SCA) para 126.

advocate, and that there was a pattern of consistent non-disclosure by Mr Edeling, which continued into this application. It contended that this demonstrated an absence of reform on his part as illustrated by the fact that disclosures were only forthcoming when he was confronted with facts identified by the Society. Furthermore his explanations always took the form of facts that were not independently verified and could not be confirmed by the Society.

[18] The Society opposed the 2009 application for Mr Edeling's re-admission. In that ex parte application Mr Edeling failed to disclose that he was practising as an advocate in Lesotho despite his removal from the roll of advocates in South Africa. When the Society raised the respondent's appearance as an advocate in Lesotho, his response was to say that he had disclosed it to the Chief Justice of Lesotho, who raised no objection. There is no independent confirmation that such a disclosure was made. Mr Edeling asserted that he did not regard the fact that he was practising in Lesotho as relevant; he was an advocate of good standing in Lesotho and that no misconduct complaint was ever lodged against him in Lesotho. In the 2015 application he said the following:

'From the effective date of my striking off in late 1999 and up until mid 2010 I had not practised as an advocate in Lesotho or elsewhere. I respectfully submit that by the time I started to practice in Lesotho in 2010 I had once more become a fit and proper person to practise.'

[19] Mr Edeling therefore decided of his own accord in 2010 that he was a fit and proper person to re-commence practise as an advocate in Lesotho. This decision, was not voluntarily disclosed until raised by the Society and was made whilst the 2009 application was still pending, and opposed by the Society. He recommenced practice knowing that his application for re-admission was pending in South Africa and opposed by the Society. He did so without reference to the Law Society of Lesotho or a disclosure to that body of his situation in South Africa. Thus he took it upon himself to decide whether he was a fit and proper person to practise in that country, disregarding the local professional body. Apparently he took the view that his previous conduct was in some way territorially confined

[20] Mr Edeling's conduct in deciding of his own accord to resume practice in Lesotho demonstrates that he has in fact not genuinely accepted his wrongdoing and the consequences. Under s 6(1)(c)(iii) of the Legal Practitioners Act No 11 of 1983 of Lesotho, a person may be admitted as an advocate in that country on the basis of their admission as an advocate in South Africa, provided they have practised in this country for a continuous period of five years and remain on the roll of advocates. Crucially therefore, because of his striking off, at the time Mr Edeling chose to resume practice he would not have qualified to be admitted as an advocate. Yet again he was exploiting a loophole, when it suited him to do so. He displayed an arrogant disregard for the law, believing that it was permissible for him and not a court of law to make the decision. This is a character defect espousing the belief that Mr Edeling clearly held that the citizens of Lesotho are not entitled to the protection afforded to South Africans against dishonest lawyers. Being a fit and proper person to practise as an advocate is not territorially confined. The Constitutional Court in *Ndleve v Pretoria Society of Advocates* said in relation to similar conduct in South Africa that:

'The applicant's continued practice as an advocate after this Court dismissed his first application for leave to appeal borders on contempt of court. It is certainly unethical unprofessional conduct. It is especially troubling since the purpose of a court's order striking an advocate from the roll is not simply punishment. It is rather "the protection of the public."'[5]

That is equally applicable to practising in a neighbouring state, which recognises admission in South Africa as befitting someone to practise there.

[21] Moreover, in neither his 2009 application, when the fact that he was practising in Lesotho came to light, nor his 2015 application did Mr Edeling disclose that a Lesotho court had trenchantly criticised his conduct as an advocate in the course of a matter. In his detailed founding affidavit in this application he asserted 'I am unaware of any complaint about my conduct or the quality of my work in Lesotho – whether by a client, attorney, colleague or

[5] *Ndleve v Pretoria Society of Advocates* [2016] ZACC 29; 2016 (12) BCLR 1523 (CC) para 10.

judge'. This was clearly untruthful on his part, (made under oath) when one considers the following: In a judgment in 2000, the Lesotho Court of Appeal said:[6]

'This alleged conspiracy was an issue throughout the hearing. A reading of the record shows, furthermore, that it is one which Mr Edeling, on behalf of his clients, particularly SDM, pursued with a recklessness and an irresponsibility which can only be described as breathtaking and with the total disregard of the proprieties expected of counsel in the conduct of his client's case. Wide ranging and scurrilous attacks were made on LHDA's witnesses, on the South African and Lesotho Governments and on LHDA, all of which proved in the result to be baseless. Uncalled for and unwarranted attacks couched in the most intemperate language were also made by Mr Edeling on counsel for LHDA.'

The court went on to say that 'the conspiracy issue was pursued in the most immoderate, irresponsible and scurrilous manner' and fully deserved the Chief Justice's description of it as 'vexatious'. It concluded by saying that Mr Edeling's conduct was deserving of the court's disapproval 'in the most stringent terms'.

[22] When the Society raised the non-disclosure of these criticisms by the Lesotho appeal court of Mr Edeling's conduct, he retorted with equal hostility that a proper consideration of the facts in that matter would lead to the conclusion that his conduct was proper. He claimed that a perusal of the trial record would evidence proper conduct on his part at all times. He added that if it had occurred to him to mention the case he believed that his conduct should have counted in his favour. He cast scandalous aspersions on four of the Judges in the Appeal Court, stating that their respected predecessors, like them retired South African judges, had been removed and the bench 'packed' for the hearing of the appeal. Reliance was placed on an opinion by counsel attacking the judgment on its merits, but that was an attempt to deflect attention away from the criticism directed at him. The opinion did not address the court's criticism of his conduct. He claimed that the proceedings that

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[6] *Swissbourgh Diamond Mines (Pty) Ltd v LHDA* 2000 Lesotho LR 432 (CA) at 45. In a related matter in South Africa, *Swissbourgh Diamonds (Pty) Ltd & others v Government of the Republic of South Africa & others* 1999 (2) SA 279 (T) at 341H-I, Mr Edeling was held to have made similar submissions recklessly relating to the same alleged conspiracy.

culminated in the appeal were currently being challenged as a denial of justice in international arbitration proceedings.

[23] Mr Edeling stated that in April 2016, *Swissbourgh Diamond Mines (Pty) Ltd* (SDM) had won an award from an International Arbitration Tribunal ordering Lesotho to submit to fresh proceedings, before a new arbitration tribunal. He said the task of the new tribunal was to decide the claim and the denial of justice alleged by SDM at both first instance and appellate level, to the effect that the President of the Court of Appeal had packed the bench and had made fundamentally flawed findings of law. The implication was that this would establish the existence of the conspiracy for which he contended and vindicate his conduct. That was incorrect. A reading of the award showed that it arose from the abolition of the SADC tribunal by the party states. Within a few days after the arbitration proceedings were commenced on 17 May 2016 Lesotho commenced proceedings before the Singapore High Court (Singapore being the seat of the arbitration) to set aside the reference for want of jurisdiction. Mr Edeling must have known this when he deposed to his replying affidavit, but he neglected to mention it. Thereafter the Singapore High Court set aside the reference in a judgment delivered on 14 August 2017.[7] That was not mentioned in the heads of argument on his behalf delivered on 8 October 2018. By then the appeal against this decision had been argued before the Singapore Court of Appeal, which dismissed the appeal on 27 November 2018.[8] We were not told any of this. When it was raised with counsel there was no suggestion that Mr Edeling was unaware of these developments. It would be a surprise if he were because the attorney for SDM was the same Mr Redelinghuys who was a co-trustee of the Condor Trust and deposed to an affidavit in support of Mr Edeling's re-admission.

[24] Although we were invited not to read this material, a perusal of it and of the two Singaporean judgments disclosed that the arbitration proceedings on which Mr Edeling relied as vindicating his conduct during that trial did nothing of the sort. There was nothing in the documents provided to us to suggest that

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[7] *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd and Others* [2017] SGHC 195.
[8] *Swissbourgh Diamond Mines (Pty) Ltd and Others v Kingdom of Lesotho* [2018] SGCA 81.

the question of his conduct was ever reconsidered after the judgment of the appeal court. Nor was there anything to support the attacks on the judges beyond conventional submissions that they had erred in their view of the applicable law governing the case. The judgment was delivered about six years after the events that gave rise to Mr Edeling's striking-off, about three years after he was struck off and some nine years before he made his 2009 application for re-admission. The normal conduct required of an advocate, and the duty of full disclosure required in *ex parte* applications, demanded that this judgment be disclosed and explained in the 2009 application and this re-admission application. Instead it was extracted by the Society and explained, as with so much of Mr Edeling's conduct, by way of denials, deflection and casting aspersions on others.

[25] Another unsatisfactory aspect of Mr Edeling's affidavits was the failure to describe in any detail exactly what he had in fact been doing between the years 1997 and 2010 when he resumed practice in Lesotho. In his founding affidavit he stated without clarification that he worked as an insolvency consultant, advised liquidators, attorneys and creditors in regard to the administration of estate and related matters. He also stated that he became proficient in various computer programming languages necessary to write internet based database systems which would enable people at different places to work in the same system and process, and access information. In this regard he said he was unable to find any clients who would pay for any such systems.

[26] According to the affidavits, after the striking off order in December 1997 Mr Edeling continued to practise as an advocate for about a year until all his applications for leave to appeal had been dismissed. During this period and beyond he continued to advise the liquidators of Supreme Holding Ltd, by whom he had previously been retained as counsel, as a consultant advising them and their legal team. In 2000 he was appointed to chair a commission of enquiry in an insolvency case in Lesotho, apparently after the striking off judgment was disclosed to the court in that country. He was also appointed to

act as a commissioner in South Africa in several instances and has acted as an 'Insolvency Consultant' working closely with 'scores of liquidators, attorneys and counsel'.

[27] The next thing we know is that he was appointed as the investor representative in the *Krion* pyramid scheme matter (*Krion*) from mid 2002 until end of 2004. The appointment was made by Mr Leon Lategan, then the Deputy Master of the High Court in Pretoria, who was aware of his striking off but regarded Mr Edeling as a 'respected member of the insolvency community'. Mr Lategan deposed to an affidavit supporting Mr Edeling's readmission. On 1 April 2004 this court handed down a judgment criticising Mr Edeling's conduct in the *Krion*[9] matter stating:

'The nature of the evidence presented in the founding affidavit and the affidavit of the first respondent (Mr Edeling) leaves one with no doubt that it was hoped that agreement between the appellants and the first respondent on all the essential issues would carry the day. Relying on authority supposedly given to him by a large number of investors to consent to the terms of the first order, the first respondent agreed that all dispositions by the scheme to creditors after March 1999 ought to be set aside. There are many reasons why he was not competent to have represented the investors or made such an admission on behalf of investors. They were debated before us in argument. He relied first on an appointment or authorization by the Master to the liquidators to appoint him to represent investors. Neither the Insolvency Act nor the Companies Act confers any such power on a Master. The first respondent's other ground is that he was appointed by the Court in terms of the scheme of arrangement. Apart from the fact that the Court did not have the power to appoint him, the worrying feature of the appointment (and that by the liquidators supposedly authorized by the Master) is that someone who had been struck from the roll of advocates was appointed in a fiduciary position. (The grounds for his striking off have been reported: *Society of Advocates of South Africa (Witwatersrand Local Division) v Edeling* 1998 (2) SA 852 (W) at 898H-899F.) Whether due disclosure of these facts had been made we do not know. Leaving aside that fact and the grave doubt whether the mandate given to the first respondent by investors was broad enough to permit him to make admissions on behalf of those whose agent he professed to be, the most fundamental objection to the first respondent's representation of a large body of

[9] *Fourie NO & others v Edeling & others* [2005] 4 All SA 393 (SCA) para 11.

scheme investors is that in discharging what was after all a fiduciary duty he was faced with a major conflict of interest between those investors who had lost money in the liquidation of the scheme and therefore were creditors of the scheme and those who were not.'

[28] According to the Society, in the *Krion* matter Mr Edeling relied upon a letter to the Master which did not adequately or correctly identify that his name had been struck from the roll of advocates. The letter motivating Mr Edeling's appointment to the position of investor representative misrepresented the circumstances in which Mr Edeling's name was struck from the roll. The relevant portion of the letter reads as follows:

'Mr Edeling practised as an advocate for almost twenty years until his name was removed from the roll arising from his involvement in a property transaction in 1993 which was structured to take advantage of a loophole in the VAT Act. There were divided opinions as to whether he acted properly or not. Senior counsel specialising in Tax matters had given opinions that the property scheme was lawful and proper. The Commissioner for Inland Revenue condemned the scheme and those who had taken part in it. The Johannesburg Bar Council held that it was not proper for an advocate. The General Council of the Bar of South Africa, however, reversed the decision of the Johannesburg Bar and held that Mr Edeling had not acted improperly in any way. Mr Edeling then severely criticised the Johannesburg Bar and alleged that they had not properly applied their minds. The Johannesburg Bar then applied to remove Mr Edeling's name from the roll, relying on his involvement in the property scheme and adding a further charge that he had insulted senior members of the Bar Council. The court held in favour of the Bar Council and removed Mr Edeling's name from the roll of advocates. The facts are reported in 1998 (2) SA 852.'

[29] Virtually the only accurate statements in this summary were that Mr Edeling had practised as an advocate for almost twenty years before his name was removed from the roll and the case reference in the striking off application. There was not a word about his dishonesty in participating in fraudulent transactions intended to procure an improper VAT advantage. The letter was silent about the findings by two courts that he had committed perjury. It misrepresented the decision by the GCB in regard to his appeal and ignored the fact that in important respects the high court made credibility findings that

were inconsistent with those of the GCB tribunal. His striking off was described merely as a 'removal' from the roll of advocates. The entire thrust of the letter was that this arose from a dispute over an arcane point of tax law. Mr Edeling did not suggest that he was unaware of this. Indeed, he annexed the letter to his affidavit with a view to rebutting the criticisms of him by this court. The relationship between Mr Edeling and the liquidators was described by Conradie JA as 'incestuous'. That appears to have been apt.

[30] When confronted with the criticism of this court in the Krion matter, Mr Edeling remarked:

'Those aspects were not fully canvassed. Had they been raised in the papers either in the court below or in the appeal, my attorneys and counsel would have ensured not only that the facts relating thereto are fully set out together with the supporting documents, but that such facts are drawn to the attention of the Supreme Court of Appeal by way of heads of argument and submissions at the hearing. In such events I submit that the remarks in question will not have been made.'

The criticism by this court was well founded as it included a query as to how a person found to be dishonest could have been appointed to such a position. Mr Edeling's reaction above is similar to his reaction in the *Swissbourgh* matter saga above. Once again he was obdurate in insisting that he had done nothing wrong, displaying a profound reluctance to accept the findings of the court against him.

[31] During 2013 Mr Edeling was instructed by the attorney general of Swaziland to represent the Government of the Kingdom of Swaziland, in a case in that jurisdiction, which he asserted was a complex liquidation matter. It is not known whether he disclosed to the Swaziland courts that he was an advocate who had been struck off the roll in South Africa. A curious feature of the judgment in that matter[10] is that both in the body of the judgment and in the record of appearances Mr Edeling was described as having the status of senior counsel (SC). When this was pointed out during the course of the appeal the suggestion proffered was that this was an unfortunate transposition of Mr Edeling's initials, but that cannot be correct as his name is reflected as

[10] *Miller & others v Government of the Kingdom of Swaziland* [2014] SZC03 (2014).

'Advocate Chris Edeling SC'. This is a South African status, as both Lesotho and Swaziland have the status of King's Counsel. It is also a status to which Mr Edeling aspired before he was struck off. The absence of an explanation of how that designation was used in a case to which he referred as demonstrating his fitness to be readmitted, is disquieting.

[32] Overall the description that Mr Edeling gives, and the other facts that can be gleaned from the affidavits suggest, that the work that he performed after he was struck off the roll as an advocate was, apart from appearing in court, almost exactly the same work that an advocate specialising in insolvency would perform. The only difference was that during the period from March 2006 to May 2008 he was employed at Afrox Safety (Pty) Ltd in various capacities. Since 2009 he has been conducting a busy practice as an advocate in Lesotho. Throughout he has explained that his removal from the roll was due to his participation in a transaction involving the exploitation of a loophole in the VAT legislation.

[33] It is clear that Mr Edeling's conduct since his striking off indicates a consistent inability to accept the findings made against him by Melamet J and the court that struck him off. Clearly he lacks remorse, much less the appreciation and acceptance of his conduct, and the reformation that is necessary to warrant his readmission as an advocate.

[34] The judgment of the high court readmitting Mr Edeling proceeded on the misconception that its decision was discretionary. It said:

'This court may readmit Edeling if in its discretion, it finds that he has once again become a fit and proper person to be re-admitted and re-enrolled as an advocate. . .

. . .

In these proceedings, as already stated, the objective is not to subject Edeling to double jeopardy, but to use his past conduct as a barometer of his reformation . . .

. . .

To refuse this application on the basis that the findings in the striking off judgment are inconsistent with what is called for in respect of the fitness and propriety of a person seeking admission or re-admission as an advocate would amount to holding against

Edeling in perpetuity, the findings of the court that struck him off; unless of course, this court finds that he has not reformed and that justice would be served by continuing to protect the public from him by refusing to re-admit him as an advocate. In that regard it is important to balance the factors set out … above to judicially exercise the discretion whether to re-admit Edeling or to dismiss the application.'

This reflected an incorrect approach to the case. Whether a person who has previously been struck off the roll of advocates is a fit and proper person to be readmitted is a question of fact and the onus of proving it rests on the applicant. The only issue before the court is whether that onus has been discharged. If it has, the court has no discretion to refuse readmission. Conversely, if it has not, the court has no discretion to overlook that failure and admit the applicant. The high court was misled by its reliance on *Swartzberg,* which dealt with the readmission of an attorney, where the statute in express terms vested the court with a discretion in regard to the applicant being a fit and proper person to be readmitted. There is no equivalent provision in the Admission of Advocates Act.

[35] In considering whether Mr Edeling discharged the onus, 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 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.'[11]

To similar effect in *Ex parte Knox* 1962 (1) SA 778 (N) at 784 it was said:

'The court's duty is first and foremost and at all times, to be satisfied in these matters that the applicant is a proper person to be allowed to practise and a person whose re-admission to the ranks involves no danger to the public and no danger to the good name of the profession.'

[36] Mr Edeling while proclaiming his honesty, integrity, and remorse, repeatedly failed to acknowledge in express terms that he was struck off for

[11] *Kudu v Cape Law Society* supra fn 2 at 345H-346A.

dishonesty. Nor did he demonstrate that he appreciated and accepted this. Indeed his conduct since then has always been consistent with an endeavour to downplay the seriousness of his misconduct. He did not disclose matters germane to the question of his readmission as an advocate. This failure undermined his assertion that he had genuinely, completely and permanently reformed and that he could be trusted to carry out the duties of an advocate in a satisfactory way as far as members of the public are concerned. His lack of candour about his dishonesty and a paucity of information about his reformation was a fatal barrier for his re-admission as an advocate. Many years have passed, and even though Mr Edeling has expressed contrition and repentance, it is clear that he has not accepted the gravity of his conduct. It followed that he failed to discharge the onus of satisfying the court that he was a fit and proper person to be re-admitted as an advocate. The appeal must succeed.

[37] In the result, the appeal is upheld and the following order made:

1 The appeal is upheld with costs including the costs of two counsel

2 The order of the court a quo is set aside and replaced by the following order:

‘The application is dismissed with costs, such costs to include the costs of two counsel.’

_____

M J D Wallis

Judge of Appeal

_____

H K Saldulker

Judge of Appeal

APPEARANCES:

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