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REFORMATION FROM CRIMINAL TO LAWYER: IS SUCH REDEMPTION POSSIBLE?

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1 Introduction

...you know nothing about Hope, that immortal, delicious maiden forever courted forever propitious, whom fools have called deceitful, as if it were Hope that carried the cup of disappointment, whereas it is her deadly enemy, Certainty, whom she only escapes by transformation.¹

The above quotation seems to imply that hope alone is insufficient if one wishes to overcome the adverse consequences of a criminal past, for example. Something more is needed, namely reformation. It is only when hope is accompanied by a sincere and successful reformation that the certainty of disappointment may be avoided.

In the context of an application for admission to the legal profession by an applicant with a criminal record, the applicant would naturally harbour the hope that his or her application will succeed. However, in the absence of a reformation of his or her moral character, the certainty is that the application will fail, thus leading to disappointment. In other words, there is hope that the application will succeed and the certainty of disappointment may be avoided only if the applicant has reformed. The aim of this article is to analyse the correctness of the above proposition. However, only a preliminary finding will be expressed.

The article thus reaches a preliminary finding in response to the question of whether a criminal past, for crimes with no political, religious or "honourable" motive, is an absolute bar to admission to the legal profession. It is argued that a criminal record is not an insurmountable obstacle to a successful admission application, but that such applications may succeed only in exceptional circumstances. Such applications

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** The idea for this article came from a prisoner who is still incarcerated. He completed his LLB degree in prison.

¹ Eliot date unknown http://thinkexist.com/quotes/george_eliot/.

have an inherent difficulty in achieving success, and their chances of their succeeding would depend on the nature of the crime and all the surrounding circumstances, which would constitute the context in which a court would exercise its discretion as to whether or not, notwithstanding the conviction, the applicant is still a fit and proper person to practice. The primary focus is thus on the "fit and proper person" requirement. With regard to the meaning of the words a "fit and proper person" Gubbay CJ in a Zimbabwean case said the following in *re Chikweche*:² "Construed in context, the words "a fit and proper person" allude, in my view, to the personal qualities of an applicant – that he is a person of honesty and reliability."³

2 Admission requirements

Admission to the legal profession is governed first and foremost by statute as well as the inherent common-law power of the court over practitioners. The different law societies also prescribe the process to be followed with an application for the registration of a contract of articles or for admission to the profession. In addition to satisfying the minimum academic requirements, an applicant must also satisfy the court that he or she is a "fit and proper person" to be so admitted.⁴ The following is a brief summary of the statutory requirements and process applicable to the attorneys' as well as the advocates' profession with an emphasis on the position of a person with a criminal record, while the following section analyses the "fit and proper person" requirement as applied by the courts particularly in cases of misconduct.

2.1 Attorneys

The *Attorneys Act* 53 of 1979 as amended lays down the requirements that must be complied with in order to be admitted as an attorney in South Africa. In terms of section 15 of the Act, an applicant must prove that he or she is 21 year of age or

² In *re Chikweche* 1995 4 SA 284 (ZC) 291 H-J.

³ In this regard mention should also be made of "integrity" as stated in *KwaZulu-Natal Law Society v Singh* [2011] ZAKZPHC 12 (25 March 2011) para 13. See also the importance of integrity in *DA v President of the RSA* [2011] ZASCA 241 (1 December 2011).

⁴ Slabbert 2011 *PELJ* 209-231.

older, is a South African citizen or has lawfully been admitted to the Republic for permanent residence and is ordinarily a resident in the Republic, and that he or she has satisfied the minimum stipulated academic requirements, including serving articles, as well as that he or she is a fit and proper person to be so admitted as an attorney. In terms of section 15(1)(a) of the Act, the applicant must also be in the discretion of the court a fit and proper person to be so admitted.

Section 22(1)(d) provides that a practising or admitted attorney may be struck off the roll of attorneys if he or she is in the discretion of the court not a fit and proper person to continue to practice as an attorney.

Section 15(3) also provides for the re-admission of attorneys. This provision states that a court may re-admit a previously admitted attorney who had been struck off the roll if such a person in the discretion of the court is a fit and proper person to be so re-admitted.

Furthermore, before an applicant approaches the court for admission or re-admission, section 16 of the Act places a duty on the applicant to satisfy the relevant provincial law society⁵ of certain facts, *inter alia* that he or she is a fit and proper person.

Each application will be dealt with on its merits. According to the Law Society of the Northern Provinces,⁶ the following process is followed: the applicant should apply in writing to have his or her articles or community service registered.⁷ A person on parole is, according to them, still fulfilling his sentence and would therefore during the time on parole not be a fit and proper person for either the registration of

⁵ The Law Society of the Cape of Good Hope, the Law Society of the Orange Free State, the Law Society of Kwazulu-Natal and the Law Society of the Northern Provinces.

⁶ www.northernlaw.co.za (Accessed 3 July 2013).

⁷ The founding affidavit must contain the following: confirmation of: the jurisdiction of the Court, your date of birth, citizenship, Grade 12 certificate, LLB degree, contract of articles of clerkship, particulars of principal and that you passed the attorney's admission examination. Most importantly you should prove that you are a fit and proper person. If you do not have a criminal record, you should confirm that you have no previous criminal convictions and that no criminal investigations are pending. Furthermore you should confirm that you have no previous civil judgments against you, that there are no civil proceedings pending against you, and neither have any disciplinary proceedings by any law society, university or employer been instituted or are pending against you. You should also confirm that your estate has not been sequestrated and that no applications for a sequestration of your estate are pending against you.

articles or admission. However, it should be borne in mind that the Law Society is required to exercise its discretion in each individual case. Much could depend on the conditions of the parole rather than on the parole *per se*. Irrespective of the approach of a Law Society, an applicant may still approach the Court because ultimately it is the court that has to decide. If the convicted person is not on parole but has completed his or her sentence, he or she must make a written application to the law society where the articles should be registered. The application should disclose everything about the applicant's offence. A written affidavit should be compiled by the applicant explaining the circumstances that led to the offence (e.g. drug abuse), whether he or she pleaded guilty or not guilty, the judgement, and the sentence. All documents - the court order, the court records and the judgement - should be attached to the affidavit, as well as an SAP clearance certificate.

The application then goes to the Articles and Admissions Committee, a sub-committee of the specific Society's council. The committee will interview the applicant and his or her principal. During this interview the applicant will be afforded an opportunity to indicate that he or she is indeed a fit and proper person to be allowed to do articles or to be admitted. The committee then advises the council of the Society on the merits of the application as it is the council that eventually confirms or rejects the decision. If the committee for some or other reason cannot take a final decision or does not want to take a final decision it will refer the matter to the council for finality. The council can ask that the applicant and his or her principal appear before it to be interviewed, after which it will make the final decision. In other words, it seems as if a person with a criminal record is *prima facie* not "fit and proper"⁸ for the profession, but a process needs to be followed in which each case will be dealt with individually.

⁸ This accords with what was stated by Wessels CJ in *Solomon v Law Society of the Cape of Good Hope* 1934 AD 401 412.

2.2 *Advocates*

Section 3 of the *Admission of Advocates Act* 74 of 1964 provides that an applicant for admission as an advocate must satisfy the court that he or she is over the age of 21 and is a fit and proper person, is duly qualified, and is a South African citizen or has been lawfully admitted to the Republic for permanent residence and is an ordinarily resident in the Republic.

Section 7(1)(d) provides that a practising or admitted advocate may be struck off the roll if the court is satisfied that he or she is not a fit and proper person to continue to practise as an advocate.

Although the *Admission of Advocates Act* does not make express provision for the re-admission of advocates, Slabbert⁹ seems to accept that the re-admission of an advocate is indeed possible, provided that the applicant satisfies the court that he or she is a fit and proper person to be re-admitted. It could be argued that the court's discretion to re-admit an advocate is based on the inherent common law power of the court to regulate its own processes.¹⁰

3 The fit and proper person requirement as interpreted by the courts

It goes without saying that a criminal record is a material fact in an application for admission to the legal profession, and that an applicant who has a criminal record must disclose the fact, regardless of the nature of the offences for which he or she was convicted.

In *Kaplan v Incorporated Law Society, Transvaal*,¹¹ the court held that the phrase "fit and proper" person relates to the personal qualities of the applicant and that, in deciding whether or not the applicant meets this requirement, the court must consider whether he or she is a fit and proper person "in relation to such matters as the prestige, status and dignity of the profession, and the integrity, standards of professional conduct and responsibility of practitioners." This case involved a re-

⁹ Slabbert 2011 *PELJ* 211.

¹⁰ *Kaplan v Incorporated Law Society, Transvaal* 1981 4 All SA 15 (T) 28.

¹¹ *Kaplan v Incorporated Law Society, Transvaal* 1981 4 All SA 15 (T).

admission application by an attorney who had been struck off the roll for unprofessional conduct. He was also subsequently convicted of perjury, theft, fraud and the contravention of section 33(1) of the *Attorneys, Notaries and Conveyancers Admission Act* 23 of 1934. The court at [48] held as follows:

In the case where an applicant was previously struck off the roll for unprofessional, dishonourable or disgraceful conduct it would at least be necessary for him to satisfy the Court that he has undergone a complete and permanent reformation in respect of such conduct. In this regard the investigation of the Court would relate to (a) the nature and particulars of the conduct that gave rise to the striking-off, (b) the behaviour of the applicant after such conduct became known and (c) the question whether it could with complete confidence be accepted that the applicant is a fit and proper person to be re-admitted as an attorney ...

The applicant in this case was refused re-admission since there was insufficient evidence before the court that the applicant had undergone a complete and permanent reformation.

- In *Ex parte Krause*¹² the applicant had a criminal conviction for attempting to incite murder. In this case the court adopted the so-called character approach. The court held that it is not the mere fact of a criminal conviction which disqualifies an applicant from being admitted to practice, but that in the majority of cases the conviction exposes the applicant's character as being unworthy of joining the ranks of an honourable profession. The court found that the crime in this case was political in nature and not motivated by any desire of personal gain or revenge. The crime therefore did not reflect adversely on the applicant's character and his application was successful.
- The character approach was applied in a number of cases up until 1956. However, in *Matthews v Cape Law Society*¹³ the court rejected the character approach and instead adopted the duty approach. According to this approach the question is not whether the criminal conviction reflects adversely on the applicant's character, but whether it is consistent with the duty of legal practitioners to uphold the law. In *casu* the applicant had two previous convictions of contravening the *Suppression of Communism Act* 44 of 1950. It

¹² *Ex parte Krause* 1905 TS 221.

¹³ *Matthews v Cape Law Society* 1956 1 SA 807 (C).

was argued on behalf of the applicant that the matter was very like the case of *Incorporated Law Society, Transvaal v Mandela*,¹⁴ in which the character test had also been applied. However, the court declined to follow the *Mandela* case, holding that the approach in that case was too narrow. The court further held that the *Mandela* case was distinguishable from the present case since Mandela had been a practising attorney when he contravened the law, whereas Matthews was not a practising attorney at the time of his criminal conduct. Since there was no indication that the applicant would engage in similar conduct in the future, and since his past criminal conduct was the only evidence relied upon by the Law Society in opposition, the court granted the application, holding that prior criminal conduct was not a bar to admission to the legal profession. This case seems to highlight the important difference between, on the one hand, a practising attorney who contravenes the law and, on the other hand, someone who contravenes the law and then subsequently applies for admission as an attorney. In the former case it would seem that the legal profession is brought into disrepute, while this is not necessarily the position in the latter case.

- In *Ex parte Moseneke*,¹⁵ the court once again declined to follow the character approach. The applicant had a previous conviction of sabotage, committed when he was still a young boy. The court expressed the view that the serious crime of which he had been convicted would, at the time of its commission, have rendered him an unfit person for the legal profession. However, since the applicant had undergone a complete and permanent reformation, his character had been reformed to such an extent that he was now a fit and proper person for the legal profession.

In the *Krause*, *Matthews*, *Mandela* and *Moseneke* cases *supra*, the applicants had all been convicted of so-called political crimes.

¹⁴ *Incorporated Law Society, Transvaal v Mandela* 1954 3 SA 102 (T).

¹⁵ *Ex parte Moseneke* 1979 4 SA 884 (T).

- In *Ex parte Ngwenya: In re Ngwenya v Society of Advocates, Pretoria*¹⁶ it was stated that an applicant who applies for admission as an advocate cannot on the one hand plead that he was wrongly convicted, and alternatively, that he has been reformed. Reformation can take place only when a person acknowledges that he or she has committed a wrongful act. The applicant's character references which testified how he had reformed were in sharp contrast with his allegation that he had been wrongfully convicted. If the character references were correct, his statement that he had been wrongfully convicted was untrue, which meant that he was not a fit and proper person to be admitted as an advocate.¹⁷
- In the Supreme Court of Appeal case of *Swartzberg v The Law Society of the Northern Provinces*¹⁸ the appellant had been struck off the roll of attorneys following complaints that he had failed to keep proper books of account, resulting in deficiencies in his trust account. He had also devised a scheme to conceal these deficiencies, thus deceiving his auditor who, on the strength of this deception, had certified that his books of account were properly maintained. In this way the appellant had been able to secure a Fidelity Certificate from the Law Society. Flowing from these allegations the appellant was subsequently charged with theft and convicted on his plea of guilty. The court held that the onus was on the appellant to prove, 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 was re-admitted he will in future conduct himself as an honourable member of the profession...".¹⁹

¹⁶ *Ex parte Ngwenya: In re Ngwenya v Society of Advocates, Pretoria* 2006 2 SA 87 (W).

¹⁷ In this regard mention can also be made of *Swartzberg v Law Society of the Northern Provinces* 2008 5 SA 322 (SCA) para [11], where reference is made to the dismissed application of Mr Swartzberg by Daniels J (Makhafola A J concurring). Daniels J stated: "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."

¹⁸ *Swartzberg v Law Society of the Northern Provinces* 2008 5 SA 322 (SCA)

¹⁹ *Swartzberg v Law Society of the Northern Provinces* 2008 5 SA 322 (SCA) para [14]. See also *Law Society v Behrman* 1981 4 SA 538 (A); *Ex Parte Aarons (Law Society Transvaal Intervening)* 1985 3 SA 286 (T).

The court found that the appellant had failed to discharge the onus of proving that he was a fit and proper person, since there was insufficient evidence that he had undergone a "genuine, complete and permanent reformation" of character. The reformation approach in *Swartzberg* appears to accept the premise of the character approach, namely that a criminal record normally exposes a defect in character which is inconsistent with the character expected of members of the legal profession, in particular where the crime involved dishonesty, as this is directly relevant to the requirement of high standards of integrity and honesty expected of practitioners. However, it also accepts that in certain cases an applicant may demonstrate that he or she is a fit and proper person to be admitted to the profession, notwithstanding the existence of a criminal record, provided he or she can prove that such a defect of character no longer exists. Seen from this perspective, it appears that the reformation approach also contains elements of the duty approach, since the applicant is required to prove that he or she will no longer engage in conduct which is inconsistent with the duty of a legal practitioner to uphold the law.

- Cognisance should also be taken of the minority report of Cloete JA in this case.²⁰ He refers to the onus that rests on an applicant to prove he or she has been reformed. He quotes passages from the applicant's affidavits in which it is clear that he has changed from a person who did not "understand the gravity of his errant ways" to a person who appreciates the wrongfulness of his behaviour – "I recognise that my conduct was reprehensible and unbecoming. I am deeply ashamed of the entire event".²¹ In support of his application he had annexed affidavits by a forensic criminologist and a church leader.²² The court *a quo* had simply brushed this evidence aside. According to Cloete JA by doing this it committed a fundamental misdirection of fact as it said: "there is no sufficient cogent evidence to demonstrate that the applicant has become completely and genuinely reformed".²³ No reasons for the court *a quo*'s conclusion had been

²⁰ *Swartzberg v Law Society of the Northern Provinces* 2008 5 SA 322 (SCA) para [35]-[49].

²¹ *Swartzberg v Law Society of the Northern Provinces* 2008 5 SA 322 (SCA) para [38]-[40].

²² *Swartzberg v Law Society of the Northern Provinces* 2008 5 SA 322 (SCA) para [41]-[42].

²³ *Swartzberg v Law Society of the Northern Provinces* 2008 5 SA 322 (SCA) para [43].

advanced. He concluded his minority report by saying that in his view, serious though the appellant's offences were, the period he had been off the roll (eight and a half years) was sufficient punishment, bearing in mind that he had repaid the monies stolen and he was paying off the costs incurred by the Law Society in the previous proceedings. In his view the appellant should have been re-admitted.²⁴

- In *KwaZulu-Natal Law Society v Singh*²⁵ the respondent was a non-practising attorney employed at the Magistrate's Court when she committed the crime of fraud. She was convicted on eight counts of fraud and was sentenced to three years imprisonment, which were wholly suspended.²⁶ She thus stood convicted of crimes involving dishonesty, which was *prima facie* proof that she was unfit to be an attorney. Yet, Madondo J remarked that the fact of conviction for an offence without any regard to its nature and the degree of moral obliquity in the offender which its commission reflects will not suffice to indicate, even *prima facie*, that the offender is unfit to be an attorney.²⁷ "For a legal practitioner to be said to be unfit to be on the roll, the misconduct complaint must be of a serious nature to an extent that it manifests a character defect and lack of integrity".²⁸ Judge Madondo went further to say: "The inquiry whether the person concerned in the decision of the court is not a fit and proper person to continue to practise as an attorney involves a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent this entails a value judgement".²⁹ "Reformation of character" is the *factum probandum*.³⁰ The question to be asked is if the particular character is so inherently flawed that the person cannot practise. In *casu* the court found that the respondent has genuinely, completely and permanently reformed her criminal character, as a

²⁴ *Swartzberg v Law Society of the Northern Provinces* 2008 5 SA 322 (SCA) para [49]. See paras [25] and [26] for the majority judgment in this regard.

²⁵ *KwaZulu-Natal Law Society v Singh* [2011] ZAKZPHC 12 (25 March 2011).

²⁶ *KwaZulu-Natal Law Society v Singh* [2011] ZAKZPHC 12 (25 March 2011) para [5]-[6].

²⁷ In this regard the judge referred to the case of *Incorporated Law Society, Transvaal v Mandela* 1954 3 SA 102 (T) 104A.

²⁸ *Incorporated Law Society, Natal v Roux* 1972 3 SA 145 (N) 150 B-C.

²⁹ *KwaZulu-Natal Law Society v Singh* [2011] ZAKZPHC 12 (25 March 2011) para [31].

³⁰ See *Behrman v Law Society, Transvaal* 1980 4 SA 4 (TPD) 9A.

considerable period had lapsed since her conviction, and over the years she had built up a thriving and successful practice.³¹ She was not struck off the roll of attorneys but she was suspended from practising for a period of one year, which suspension was suspended for three years on condition that she was not found to have committed any dishonest conduct during the period of suspension.³²

- Brief mention should also be made of the *Prince* saga.³³ Prince was a devout Rastafarian with two previous convictions for the possession of dagga. He applied to register his contract of community service of a prospective attorney and stated his intention to continue using dagga in accordance with his religious convictions. The Law Society refused to register his community service since it took the view that a person who breaks the law, and also declares his intention to continue breaking the law, is not a fit and proper person for the legal profession.

Prince initially sought an order reviewing and setting aside the Law Society's decision as well as an order directing the Law Society to register his community service with effect from 15 February 1997. As the litigation progressed, his claim morphed into a constitutional attack against the provision of section 4(b) of the *Drugs and Drugs Trafficking Act* 140 of 1992 and section 22A(10) of the *Medicines and Related Substances Control Act* 101 of 1965. The principle issue, therefore, was if these provisions were unconstitutional in so far as they did not allow for a *bona fide* religious exemption for the personal use of cannabis. This question was answered in the negative. Assuming Prince had confined his claim to an order reviewing and setting aside the decision of the Law Society and directing the Law Society to register his articles, it is doubtful that this approach would have been successful. Prince declared his intention to continue using cannabis (i.e. to continue breaking the law). He therefore could not be said to have had a "complete and permanent reformation". On an application of the duty approach, Prince would therefore clearly have been forced to choose between his religious convictions and his career. It is

³¹ *KwaZulu-Natal Law Society v Singh* [2011] ZAKZPHC 12 (25 March 2011) para [47].

³² *KwaZulu-Natal Law Society v Singh* [2011] ZAKZPHC 12 (25 March 2011) para [54].

³³ *Prince v President of the Law Society, Cape of Good Hope* 1998 8 BCLR 976 (C), *Prince v President, Cape Law Society* 2000 3 SA 845 (SCA), *Prince v President, Cape Law Society* 2002 2 SA 794 (CC).

conceivable that the character approach would have yielded the same result, since it could be argued that a criminal record together with an avowed intention to continue breaking the law reflects adversely on the applicant's character.

4 Findings

The cases discussed above, while differing in context, all have one thing in common: all the applicants had criminal records. In some cases the applicant was unsuccessful, while in others the application was granted. This in itself shows that a criminal record is not an absolute bar to admission to the legal profession.

The applicants in these cases can further be divided into two categories, namely first-time applicants with criminal records for crimes having an "honourable" motive, such as political or religious motivations, and applicants for re-admission with criminal records for crimes having no "honourable" motive. These cases are therefore distinguishable from the focus of this paper, which is on first-time applicants with criminal records for crimes having no "honourable" motive. Cognisance should be taken, though, of crimes which involved dishonesty, as with these kinds of crimes it could be particularly difficult to pass the test of being fit and proper, because dishonest character traits are incompatible with the requirements of the profession.

In view of this distinction, it is not possible, at this stage, to lay down with absolute certainty the principles that would be applicable in a first-time admission application where the applicant has a criminal record for a crime having no "honourable" motive. It is also not certain which factors would be taken into account. Each case would depend on its own facts and circumstances. It is reasonable, however, to assume that the court would at the very least require proof of reformation, since both the criminal record and proof of reformation (if any) are certainly relevant to the question of whether or not the applicant is now a fit and proper person.

It is furthermore argued that the cases involving re-admission applications, especially where the applicant had a criminal record for crimes devoid of any

"honourable" motive, are more closely analogous for the present purposes.³⁴ Accordingly, these cases will be used as the basis for a preliminary finding. It should be remembered that the courts are understandably cautious in re-admission applications, especially where the applicant's previous misconduct resulted in a criminal conviction, since the legal profession is brought into disrepute when one of its members is found guilty of criminal conduct.³⁵

In *Kaplan* much was made of the inadequacy of the facts disclosed by the applicant and the court concluded this aspect as follows:

It was important that the information should have been detailed and complete, because an applicant for re-admission should make full disclosure of his misdeeds. His misdeeds are vitally relevant to the question of re-admission.³⁶

It is submitted that the principle of full disclosure applies to an application for admission,³⁷ and not only to a re-admission application. It would, therefore, be incumbent on any applicant who has a criminal record to make a full disclosure, not only of the fact that he or she has a criminal record, but also of the details of the circumstances of the crime.³⁸ The circumstances surrounding the commission of the crime should be described with sufficient detail to enable the court to determine if the crime reflects adversely on the applicant's character.³⁹ The purpose of full disclosure seems to be two-fold. First, it enables the court to make an informed

³⁴ See *Swartzberg v Law Society of the Northern Provinces* 2008 5 SA 322 (SCA) para [15] as an indication of what the court would consider as showing that the onus has been discharged.

³⁵ In *Kaplan v Incorporated Law Society, Transvaal* 1981 4 All SA 15 (T), Boshoff JP remarked as follows on this aspect: "It is essential for the prestige, status and dignity of the profession that practitioners should not be identified with any form of dishonesty or dishonourable conduct in the eyes of the public at large, the Court and those concerned with the administration of Justice." The court has a residual discretion in a re-admission application as opposed to an admission, see *Ex Parte Aarons (Law Society Transvaal Intervening)* 1985 3 SA 286 (T).

³⁶ *Kaplan v Incorporated Law Society, Transvaal* 1981 (2) SA 762 (T) at 792.

³⁷ *Ex parte Cassim* 1970 4 All SA 321 (T); *Ex parte Singh* 1964 2 All SA 533 (N).

³⁸ *Ex parte Cassim* 1970 4 All SA 321 (T); *Ex parte Singh* 1964 2 All SA 533 (N).

³⁹ In *Kaplan v Incorporated Law Society, Transvaal* 1981 4 All SA 15 (T), Boshoff JP appears to have leaned towards the old character approach when he remarked as follows: "It is no exaggeration to say that, on such evidence as there is before the Court, the applicant clearly was an inherently dishonest person and committed crimes involving moral turpitude. He was everything that an attorney should not be. He not only stole money from his clients but also used his office to defraud litigants and did not hesitate to commit perjury in an attempt to defeat the ends of justice. Even at the present time he is not candid with the Court". This also appears to be the case in *Swartzberg v Law Society of the Northern Provinces* 2008 5 SA 322 (SCA), where Ponnar JA commented as follows: "It would be no exaggeration to say that, on such evidence as there is, the appellant has demonstrated a propensity toward inherent dishonesty".

decision on the merits, and secondly, it tests the extent of the applicant's veracity. An applicant who does not make a full disclosure cannot be said to be honest and trustworthy since he or she misleads the court by not placing relevant facts on record.

In addition, the applicant must discharge the burden of proving, on a balance of probabilities, that despite his or her prior criminal conduct, he or she is now fit and proper for the legal profession by virtue of having undergone a genuine, complete and permanent reformation. As is evident from the *Kaplan* and *Swartzberg* cases, this is no easy task. In the case of *Kaplan* the applicant furnished affidavits from various prominent individuals who testified that he was a reformed character and that he was a fit and proper person to be re-admitted. The court commented as follows on this type of evidence:

the first important point therefore to consider is whether he has shown that he is completely and permanently reformed. The only person who can competently and validly testify to such a fact are persons who know all about his misdeeds and the circumstances in which they were committed; in other words, they must first know about his character or personality traits which gave rise to or caused him to commit his misdeeds before they are able to say that he is completely and permanently reformed in respect of those character or personality traits.⁴⁰

On an evaluation of the affidavits furnished by the applicant the court concluded as follows:

In the instant case all the witnesses who made affidavits to testify to the fitness and propriety of the applicant to be an attorney, are relatives, friends and personal acquaintances – some for a short period – all laymen who have no knowledge of the demands of the office of attorney. They are in no way qualified to express an opinion on the suitability of any person to be an attorney. It does not appear from their affidavits that they know, and it is in the circumstances most unlikely that they know, the true nature of the crimes committed by the applicant and the circumstances in which he committed them. Their affidavits for this reason only speak about his honesty in handling cash moneys, and then it is not clear whether he handled the moneys unsupervised.⁴¹

The court also pointed out the difficulty of proving, in certain types of cases, that the applicant has undergone a complete and permanent reformation. In this regard, Boshoff JP in the *Kaplan* case observed that:

⁴⁰ *Kaplan v Incorporated Law Society, Transvaal* 1981 (2) SA 762 (T) at 793.

⁴¹ *Kaplan v Incorporated Law Society, Transvaal* 1981 (2) SA 762 (T) at 794.

Where the unprofessional conduct consisted of theft or similar offences it is relatively easy to establish that the applicant has undergone complete and permanent reformation. Usually evidence is placed before the Court that he has for some length of time handled money without supervision and proved his honesty. The position is, however, different when the unprofessional conduct is perjury and fraud. It is difficult to conceive what kind of evidence can be placed before a Court to satisfy it that the applicant is completely and permanently reformed.⁴²

In the *Swartzberg* case, the court also stated that where the unprofessional conduct consists of theft, the applicant could prove that he or she has undergone a complete and permanent reformation 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".⁴³ However, in view of the applicant's "somewhat chequered work history" subsequent to his striking-off, he was unable to adduce such evidence.⁴⁴

In the final analysis, however, the court makes a value judgment in deciding if an applicant is a fit and proper person to be admitted to the legal profession.⁴⁵ This means that although judgment is based on the totality of all the facts, the decision is ultimately a subjective one based on the court's own sense of appropriateness.⁴⁶ Each case is therefore judged on its own merits and it is accordingly not possible to stipulate any hard and fast rules.

5 Conclusion

Kriegler J said in *S v Mamabolo*⁴⁷: "Having no constituency, no purse and no sword, the judiciary must rely on moral authority." By being admitted on the roll of attorneys or advocates the applicants are held out to the public as being worth their trust. The Law Society and the Bar Council are the *custos morum*s of the legal

⁴² *Kaplan v Incorporated Law Society, Transvaal* 1981 (2) SA 762 (T) at 793.

⁴³ *Swartzberg v Law Society of the Northern Provinces* 2008 5 SA 322 (SCA) para [30].

⁴⁴ See also *Ex parte Aarons (Law Society Transvaal Intervening)* 1985 3 SA 286 (T), where the applicant was found guilty of being accessory after the fact to fraud and contravening the Exchange Control Regulations.

⁴⁵ *Jasat v Natal Law Society* 2000 3 SA 44 (SCA) 51E.

⁴⁶ See the minority judgement of Cloete JA in *Swartzberg v Law Society of the Northern Provinces* 2008 5 SA 322 (SCA) para [37]: "the court has a residual discretion to refuse admission, because of the use of the word 'may' in s 15(3) (in contradiction to the use of the word 'shall' in s 15(1), which deals with admissions ... The parameters of the discretion are nowhere circumscribed".

⁴⁷ *S v Mamabolo* 2001 3 SA 409 (CC) para 16.

profession with the right to determine who shall enter the profession and who is not fit and proper to practise.

It seems as if a criminal record in itself is not an insurmountable obstacle to a successful admission application. However, it is equally clear that a first-time applicant who has a criminal record for crimes devoid of any "honourable" motive has a heavy burden to discharge in order to convince the court that he or she is a fit and proper person for the legal profession. Furthermore, in certain cases it may not even be possible for the applicant to discharge this onus due to the nature of the offence involved. Much depends on whether the applicant has made sufficiently full disclosure, and whether he or she can prove that he or she has undergone a complete and permanent reformation of character. The court's sense of what is appropriate in the circumstances of each particular case is decisive, but there should always be hope.

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PELJ

Potchefstroom Electronic Law Journal

REFORMATION FROM CRIMINAL TO LAWYER: IS SUCH REDEMPTION POSSIBLE?

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DJ BOOME**

SUMMARY

If a person with a criminal record were to apply for admission to the legal profession, the applicant would naturally harbour the hope that his or her application would succeed. However, in the absence of a reformation of his or her moral character, the certainty is that the application will fail, thus leading to disappointment. The aim of this article is to analyse the correctness of the above proposition. It is argued that a criminal record is not an insurmountable obstacle to a successful application for admission, but that such applications may succeed only in exceptional circumstances.

KEYWORDS: Admission; legal profession; fit and proper; criminal record; reformation; integrity; honesty; lawyer

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