



**IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]**

Case number: 2481/2014

In the matter between:

CAPE BAR COUNCIL

Applicant

and

"K"
[REDACTED]

Respondent

JUDGMENT DELIVERED ON 29 APRIL 2014

Le Grange, J:-

Introduction:

[1] This is an application in terms of section 7(2) of the Admissions of Advocates Act, no 74 of 1964 to strike the Respondent off the rolls of advocates. The gravamen of Applicant's case is premised on three complaints. According to the Applicant the alleged misconduct is of such a serious nature that if proven renders the Respondent unfit and unbecoming to practice as an Advocate.

The background:

[2] The facts underpinning the Applicant's case, which largely remains common cause, can be summarized as follow. The Respondent in September 2011 applied by means of a written application for pupillage membership of the Applicant. The Applicant's pupillage committee as part of the admission process conducted an interview with the Respondent. Pursuant to the interview the Respondent was admitted to the program and commenced his pupillage in January 2012. He was also admitted and enrolled as an advocate in March 2012 by this Court.

[3] In September 2012 and as a result of information that came to the Applicant's pupillage committee's attention, events took a rather different turn for the Respondent.

The events of 1996 to 2001:

[4] The information received relates to events that occurred during 1996 to 2001. In April 1996 a court order was issued by the Witwatersrand High Court, in terms of which sole custody of the Respondent's minor child, ^R [REDACTED], was granted to his ex-wife *pendente lite*. In terms of the said Court Order, the Respondent was ^R *inter alia* not allowed to take [REDACTED] beyond the borders of South Africa.

[5] The evidence on record clearly shows the Respondent deliberately contravened the Court's order by removing ^R [REDACTED] from South Africa in October 1996

and fleeing to Europe, where the Respondent remained for 5 years. As a result of these events a warrant for his arrest was issued in South Africa. The Respondent was also sought by Interpol in respect of these events. During 2001 the Respondent was briefly detained by the Italian authorities, and was found in possession of falsified passports for himself, ^R [REDACTED] and another child.

[6] Pursuant to these events a custody court battle ensued between the Respondent and ^{R's} [REDACTED] mother in respect of ^{R.} [REDACTED]. Custody was eventually awarded to ^{R's} [REDACTED] mother. The criminal charges were withdrawn against the Respondent.

The Bar Council's proceedings:

[7] The Applicant, upon learning of the allegations, caused two of its members to interview the Respondent. The purpose of the meeting was to discuss the allegations against the Respondent and to give him an opportunity to respond.

[8] The Applicant, after the interview with the Respondent, initiated disciplinary proceedings against him. As a result of the disciplinary proceedings pending against him, the Respondent was not admitted as a full member of the Applicant although he passed the pupillage examinations. He was suspended from pupillage, pending the outcome of the disciplinary hearing.

[9] The Respondent in writing responded to the Disciplinary Committee's ("the DC") questions put to him in writing and set out his version of the events that occurred between the period of 1996 to 2001. The DC decided to hear oral evidence and a formal disciplinary hearing followed, during which the Respondent was represented by Mr. L Burger, SC. At this hearing the Respondent was also cross-examined.

[10] After the formal hearing, the Respondent was found guilty of the three complaints and despite further representations on behalf of the Respondent, the Applicant ultimately decided to launch the present proceedings.

The complaints against the Respondent:

[11] The first complaint is that the Respondent deliberately furnished false information in the pupillage membership application form. The second is that the Respondent deliberately misled the pupillage committee. The third complaint is that the Respondent failed to disclose pertinent and relevant facts in his *ex parte* application for his admission and enrolment as an advocate to this Court.

[12] In resisting the relief sought, the Respondent raised a number of defences. In respect of the first complaint, his defence is that he merely made clerical errors in answering certain questions on the pupillage application form. Furthermore, the Respondent denies deliberately withholding information from the pupillage committee. According to him he acted on advice from his wife, an attorney, and

other colleagues, before completing the questionnaire. Furthermore, the events in 1996 -2001 occurred a long time ago and he decided not to reveal it to the pupillage committee.

[13] In respect of the second complaint, the Respondent submitted he had no intention to mislead the pupillage committee and merely answered certain questions posed to him in 'a garbled fashion'. With regard to the third complaint the explanation advanced was that in drafting his affidavit, he was guided by the Applicant's own explanatory notes and he never had the intention to deliberately hide information or to mislead the pupillage committee or the Court.

[14] Mr. P Botha assisted by L. Viljoen appeared for the Applicant. Mr L Burger, SC assisted by D. Baguley and A. Brink appeared for the Respondent.

Applicable legal principles

[15] The approach to an application of this nature was set out in Kekana v Society of Advocates of South Africa 1998(4) SA 649 (SCA) at page 654 D - E. The proper approach to adopt is "...the Court first has to decide whether the alleged offending conduct has been established on a preponderance of probability and, if so, whether the person in question is a fit and proper person to practice.... Although the last finding to some extent involves a value judgment, it is in essence one of making an objective finding of fact and discretion does not enter the picture. But, once there is a finding that he is not a fit and proper person to practise, he may in the Court's

discretion either be suspended or struck off the roll".

The complaints:

[16] In applying these principles, I now turn to deal with the complaints against the Respondent. The first relates to the completion of the Applicant's pupillage application form. The Applicant avers there are three instances where the Respondent deliberately answered certain questions dishonestly on the form.

[17] The first relates to question 12. This question requires the applicant to tabulate all of his previous activities since leaving high school, including, amongst others, study, employment, occupation, travelling and unemployment. The Respondent recorded that he moved to Europe from November 1997-January 1998 for family reasons. The Respondent did concede he completed the application which is a single document after careful consideration but some errors were merely clerical in nature. He denies committing any misconduct. According to the Respondent his failure to provide exact details of his traveling abroad was merely an oversight. The Applicant on the other hand holds the view that the Respondent was dishonest and deliberately failed to disclose the real reasons for moving to Europe.

[18] Mr. Burger argued that the Respondent did not commit any misconduct in answering question 12. According to him the question calls for a chronology not a narrative and provided space for nothing more. Furthermore, the Respondent certainly did not attempt to mislead or obscure any facts.

[19] On a proper reading of the reply to this question, I will accept in favour of the Respondent some typographical errors were made. For instance, the Respondent stated he travelled around Europe between July 1991 to December 1992, whereas the latter date should have read December 1991.

[20] The Respondent's explanation for failing to provide any further detail of his travelling abroad, is in my view unconvincing. The Respondent indicated he *'was under considerable pressure to complete the form in time'* and secondly his *'secretary in Milan typed it up and simply failed to check it properly'*. This explanation is somewhat irreconcilable with his version at the DC that he completed the form, which is a single document, after some careful consideration and advice. The Respondent was between January 1995 and April 1995 in Romania and between May 1995 and January 1996 in London. Furthermore, he worked for UAL Merchant Bank between February 1996 and October 1996 and not October 1997 as stated. His move to Europe for family reasons occurred between November 1996 to January 1998 and not November 1997 as stated. It is inconceivable that these mistakes were made inadvertently, when he remained at large from the authorities at the time. Moreover, the further suggestion that this particular paragraph *'does not call for nor provides for any space for an explanation, even a brief one, for why certain activities were undertaken'* is also far-fetched. The Respondent clearly made a conscious decision at the time of completing the form not to reveal all the events that took place during 1996 to 2001, as they were according to him, events that took place in the distant past.

[21] Question 34 and 35 relate to '*Further Information*'. Question 34 calls upon an applicant to answer whether he/she has ever been investigated for or faced charges of misconduct, dishonesty or other improper conduct inter alia in relation to employment, profession, or university studies, or whether he/she has ever been investigated for or faced criminal charges or has ever been arrested or paid an admission of guilt fine, other than minor traffic violations, or whether any tribunal or court has ever made a finding against the applicant. Question 35 requires an applicant to make a full disclosure of any further matter which may have a bearing on his/her fitness to undertake pupillage or practise as an advocate. Question 37 is a declaration to the effect that an applicant has provided information that is true, correct and knows of no other misconduct that would render him or her unsuitable to be a pupil or to be admitted as an advocate. It has been conceded by both parties that if the Respondent is found to have answered questions 34 and 35 honestly then he made his declaration in question 37 honestly. If however the converse is found then question 37 has been answered dishonestly.

[22] On a proper reading of question 34 the Respondent was required to disclose that he had twice been charged with child abuse and had been investigated for contempt of Court. It is not in dispute that the child abuse charges were brought during the on-going divorce proceedings between the Respondent and his ex - wife, and later withdrawn. The Respondent states the reason for his non- disclosure was as a result of him misreading the question, and not the fact that charges were withdrawn. Furthermore, he was of the view the question concerned only matters

relating to his professional and academic life, not his personal life, and had simply misread the question.

[23] Counsel for the Respondent contended that in respect of these questions all that has been shown is that he made two errors. Firstly, the Respondent misread question 34, and secondly, an error of judgment was made when answering question 35.

[24] On a conspectus of all the facts in this instance, I am not persuaded that only an error of judgment was made or that there was a misreading of a question by the Respondent. The answers he furnished in this regard are not only illogical but highly improbable and fly in the face of his own version that before completing the questionnaire he consulted with other colleagues and his wife, a fully qualified lawyer.

[25] The Respondent at the time of completing the questionnaire had significant real world experience. He was at the time about 47 years old. He worked as a prosecutor for approximately one year. He was a legal advisor at various institutions locally and abroad. This amounts to about 6 years of his work related experience. He also completed his LLM studies. He took advice before completing the form. The suggestion therefore that he misread the relevant question is in my view contrived.

[26] On the established facts, there can be no doubt that the Respondent made a conscious decision to disclose as little as possible of the historical and true events of

his past. The only reasonable inference to make in these circumstances is the Respondent had deliberately and consciously done so and had falsified the information because he knew a real likelihood existed that he would not be accepted as a pupil of the Applicant if the true facts were revealed. The Respondent's justification for his answers is therefore untenable and highly unlikely and falls to be rejected. This also applies in respect of question 37.

[27] The second charge is that the Respondent ought to have disclosed more at his interview in October 2011 with the pupillage committee and that he in fact deliberately misled it. The Respondent's view in this regard is that his answer may have not been perfect and may be construed to be misleading but it was not done deliberately.

[28] It was contended on the Respondent's behalf that he simply did not want to disclose a matter which was still painful to him if not absolutely obliged to do so because of the particular nature of these events. Having realised that it was incumbent upon him to reveal these events he has subsequently done so in a full and a proper manner.

[29] The Respondent's reply to the pupillage committee as to the main reason why he left South Africa in 1996 does not bear scrutiny. The question by the committee was simply for the Respondent to advance an explanation why he recorded on the form that in November 1997, he '*moved to Europe for family reasons*'. His initial response was that his ex-wife abducted his daughter in 1996. According to him the

only way he could help was to go to look for the child as he knew his ex-wife had relocated to Europe but did not know exactly where. His later version is however a radical departure from the answer given to the pupillage committee. On his later version the events of 1996 left an indelible mark on his memory. He was embroiled in a custody battle with his ex-wife. This caused him to consider obtaining passports and to remove his daughter from his ex-wife's custody and to leave South Africa. He embarked upon two experimental runs across the South African borders and back. Eventually on 19 October 1996 he left with his daughter, crossing the border into Botswana and making his way to Europe through Africa. It was also the beginning of the five year period during which he was on the proverbial run from the authorities with his daughter.

[30] The suggestion that his initial answer to the committee was not deliberate but at most '*garbled*' or misleading, is in my view untenable and unconvincing. The Respondent's answer was clearly a calculated response. His aim was no doubt to generate an impression favourable towards his own character and to make a positive impression on the committee in order to be admitted into the pupillage program. The Respondent's reply to this complaint can therefore safely be rejected and falls to be dismissed.

[31] In respect of the last complaint the Respondent's defence can be summarised as follows: the events happened nearly two decades ago and are unrelated to his professional life; the criminal charges were withdrawn and do not constitute matter

that required disclosure; the wording used by him in his application for admission as an advocate to this court is a precedent for: the Applicant's website and therein the relevant disclosures refer only to convictions or outstanding civil judgments; he at no stage committed perjury and was under no legal obligation to disclose the information. The Respondent readily concedes now that he should have disclosed more and the fact that he omitted to do so was an error of judgement on his part.

[32] The Respondent's concession, although after the fact, that he should have disclosed in his admission application that he breached a court order previously is commendable, despite the time elapsed. A disturbing feature in this matter is however the Respondent's attempt to create an atmosphere of sympathy and justifications for his actions, which includes the manner he completed the pupillage application form, his answers during the disciplinary hearing and even to some extent his response in his answering affidavit.

[33] A submission was made on behalf of the Respondent that some leniency must be shown towards him. The argument advanced was that the Respondent was still in the pupillage program at the time of filing his affidavit for admission as an Advocate and may have lacked insight of what was required from his profession. I have no difficulty with this submission when dealing with a person lacking real world experience. The Respondent does not fall in this category. He is of middle age. He worked at various institutions locally and abroad. He worked as prosecutor in this country for approximately one year. He was a legal advisor to an Italian legal firm

and was involved with some legal writing and training abroad. In my view he had no legitimate excuse for not disclosing his relevant historical past in his affidavit for admission. Moreover, if an applicant is admitted as an advocate of this Court he or she is *de jure* entitled to practise as such, despite the Applicant's own rules and constitution. A very high degree of integrity and honesty is therefore demanded from an applicant when he/she files an affidavit to be admitted as an advocate or an attorney of this Court. In this instance the Respondent's conduct falls desperately short of what is required from an advocate.

Conclusion:

[34] I am satisfied the Applicant has established on a balance of probabilities the misconduct levelled against the Respondent.

[35] It was argued on behalf of the Respondent that he has already been suspended from practise for 16 months and that this is an adequate sanction for his misconduct and that he should be found fit to remain in practice.

[36] It is trite that absolute personal integrity and scrupulous honesty are demanded of legal practitioners. Judges and magistrates are usually but the mirror that reflects the lawyers practicing around the court. Courts are therefore reliant on advocates, attorneys and prosecutors to fulfill their functions honestly, competently and with utmost integrity. Without such assistance Courts would rarely be able to discharge their constitutional duty to uphold the law without fear, favour or

prejudice. See Chaskalson "*Rule of Law: The importance of independent courts & legal professions*" – address to the Cape Town Law Society on 9 November 2012.

[37] The misconduct established against the Respondent is serious. The Respondent's attempts to justify his actions are of utmost concern to this Court. On a conspectus of all the established facts the Respondent's integrity has been seriously compromised in the present instance. His conduct no doubt falls short of what is required from an advocate. The relief sought by the Applicant is therefore unassailable.

[38] For these reasons it follows the application must succeed and that a proper case has been made out for the striking off of the Respondent from the roll of advocates.

[39] In the result the following order is made:

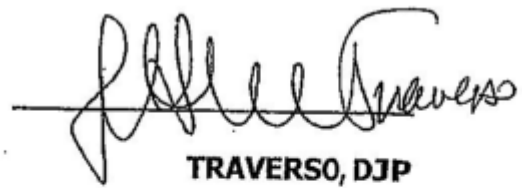
The Application succeeds with costs. The Respondent's name is to be removed from the Roll of Advocates.

A handwritten signature in black ink, appearing to read 'Le Grange', written over a horizontal line.

LE GRANGE, J

JUDGE OF THE HIGH COURT

I agree, and it is so ordered

A handwritten signature in black ink, appearing to read "John E. Traverso", written over a horizontal line.

TRAVERSO, DJP

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT