FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable: NO
Of Interest to other Judges: NO
Circulate to Magistrates: NO

Case No:5806/2022

In the matter between: -

LEGAL PRACTICE COUNCIL Appellant

and

ZWANETTE FOURIE Respondent

CORAM: MBHELE DJP, J *et* BOONZAAIER AJ

JUDGMENT BY: BOONZAAIER, AJ

HEARD ON: 19 JANUARY 2023 & 9 FEBRUARY 2023

DELIVERED ON: This judgment was handed down electronically by circulation to the parties` legal representatives by electronic mail. The date and time for hand -down is deemed to have been at 14h00 on 10th February 2023

INTRODUCTION

[1] This is an application in terms whereof the South African Legal Practice Council, (the 'LPC') seeks an order to suspend the Respondent, Zwanette Fourie from practising as a legal practitioner of the High Court of South Africa pending her compliance with the **Legal Practice Act, 28 of 2014**, (the 'LPA'), for such a period that the court deems fit. The Applicant also seeks other ancillary relief, as will become clear later in this judgment. The application is not opposed.

[2] The Applicant discharges its mandate through the application of the LPA effectively succeeds the Law Society of South Africa and its provincial arms, (the Law Society). Briefly, the Applicant is the custodian and repository of the rules of the conduct of the legal profession, it also plays an oversight role over the conduct of legal practitioners.

[3] The Respondent practised as a sole practitioner under the name of Zwanette Fourie Attorneys, a firm conducting the practice of attorneys, in terms of the provisions of **Section 34(5) (a)of the LPA** at 23 Piet Retief Street in Clocolan, Free State Province since 18th June 2007.

BACKGROUND FACTS

[4] The Applicant alleges that the Respondent contravened several provisions of the LPA and rules of the Law Society, attorneys' profession, legal practice rules and code of conduct in that:

[a] The respondent has submitted her audit reports for 2019 and 2021, however for both periods she received a qualified audit finding. She has failed to deal with the negative findings for those periods.

[b] She practised without Fidelity Fund certificates from 01 January 2019 to date.

[c] She failed to effect payment of her mandatory LPC annual membership fees in respect of 2019 to 2022, totalling R13 322.00, (Thirteen thousand, Three Hundred and Twenty-Two Rand)

[5] Furthermore, the Applicant dispatched letters to her in which, she was reminded on several occasions of her failure to comply. First, a letter was sent to her postal address on 01 April 2022; another letter was sent on 04 April 2022 from Risk Compliance via her e- mail address; a further registered letter was sent on 6 April 22. On 14 June 22 another letter was sent to inform the practitioner that the matter was referred to the Investigating Committee of the LPC.

[6] On 18 August 22 a final reminder was sent to the practitioner to remind her of her obligations to comply with the provisions of the LPC Act in particular with section **84(1);85(1)(b), 86(1) and 95(1).** She was informed that the Applicant will proceed with an application to suspend her.

[7] The Respondent recently dispatched a letter to the Director of the LPC indicating that she has ceased practice and that she is teaching for the past two years and has no desire to practice ever again.

[8] It seems that the Respondent is not practising since 2020/2021.She further asserts that she has handed over her files to a colleague from Ladybrand, who took over her practise.

<u>ISSUES TO BE DECIDED</u>

[9] The *crux* of the Applicant submits that the Respondent is no longer a fit and proper person to practice as a legal practitioner when viewed in light of her aforementioned conduct in its entirety, which conduct constitutes aberrant deviation from the standards of professional conduct set by the Law Society and its successor, the LPC.

[10] This Court is confronted with the following:

[a] The task of making a judgment call whether as a matter of fact, the offending conduct on respondent's part has been established;

[b] In the event of the Court being satisfied that the offending conduct has been established, a value judgment is required to decide whether respondent is not a fit and proper person to practice as an attorney; and

[c] If the Court decides that the Respondent is not a fit and proper person to practice as an attorney, it must decide in the exercise of its discretion within all the circumstances of the case that the attorney in question should be suspended from practice.

[11] Based on the facts presented and before it, this Court has a discretion in the decision. For this reason, such facts must be proven on a preponderance of probabilities. Such exercise of discretion also calls for consideration of the facts in their entirety; and each issue must be considered on its own merits.

<u>FACT BASED INFRACTIONS OF THE RULES</u>

The respondent's repeated failure to comply with rule 70 auditor's report

[12] Notwithstanding annual calls from the LPC, it is beyond argument that for an uninterrupted period of 2 (two) years, to wit, 2019 to 2020, respondent failed to submit her audit reports.

Respondent's failure to attend to the matter

[13] It is common cause that respondent failed to attend to any correspondence in this regard or to answer to allegations which were levelled against her. She however indicated in a letter (received 17 January 2023 at the LPC) that she did communicate with the Council via electronic-mails, where she indicated her intention not to practice anymore.

Practising without a fidelity fund certificate

[14] Respondent has been practising without a Fidelity Fund Certificate. An inference is capable of being drawn without equivocation that the Respondent was practising without a Fidelity Certificate because she did not submit her auditor's reports as alluded to. No explanation was proffered by the Respondent for this material breach of the rules. If it is accepted that she left practice and transferred her practice' files to another attorney she did that without providing the winding up audit report

SURVEY AND ANALYSIS

[15] The requirement for and purpose of submitting annual audit reports is to satisfy the LPC that an attorney's accounting records are kept in accordance with the provisions of Rule 70 and Rule 39.11 of the LPA. This includes that attorneys are enjoined to handle and administer trust funds entrusted upon them by their clients in a manner prescribed by the said Rules. Consequently, a failure to submit these reports constitutes a breach of rule 70 and Rule 39.11.

[16] With the court having found that the offending conduct has been established as evinced above, the court then exercises a value judgment, to arrive at a decision whether the respondent is a fit and proper person to practice as an attorney. The court has regard to all the circumstances of the case and proceeds to determine whether the respondent should be suspended from practice for a specified period.

[17] In **Malan & Another v Law Society of the Northern Provinces**[1] , the SCA pronounced that this ultimately boils down to a question of degree.[2]

[18] For present purposes, it is convenient to take cognizance of what the judge found in the Malan- case:

[1] (568/2007) [2008] ZASCA90;2009(1) SA 216(SCA); [2009]1ALL SA 133(SCA) (12 September 2008)

[2] Ibid Malan at paragraph 5 to 9

"The nature of the conduct may be such that it establishes that the person is not a fit and proper person to continue to practise. In other instances, the conduct may not be that serious and a law society may exercise its disciplinary powers, particularly by imposing a fine or reprimanding the attorney (section 72(2)(a)). This does not, however, mean that a court is powerless if it finds the attorney guilty of unprofessional conduct where such conduct does not make him unfit to continue to practise as an attorney. In such an event the court may discipline the attorney by suspending him from practice with or without conditions or by reprimanding him"[3]

[19] First, in deciding on whichever course to follow the court is not first and foremost imposing a penalty. The main consideration is the protection of the public.

[20] Second, logic dictates that if a court finds that someone is not a fit and proper person to continue to practise as an attorney, that person must be removed from the roll. However, the Act contemplates a suspension. This means that removal does not follow as a matter of course. If the court has grounds to assume that after the period of suspension the person will be fit to practise as an attorney in the ordinary course of events, it would not remove him from the roll but order an appropriate suspension. In this regard the following must be borne in mind:

"The implications of an unconditional order removing an attorney from the roll for misconduct are serious and far reaching. *Prima facie*, the Court which makes such an order visualises that the offender will never again be permitted to practise his profession because ordinarily such an order is not made unless the Court is of the opinion that the misconduct in question is of so serious a nature that it manifests character defects and lack of integrity rendering the person unfit to be on the roll. If such a person should in the years apply for re admission, he will be required to satisfy the Court that he is "a completely reformed character" (*Ex parte* Wilcocks 1920 TPD 243 at 245) and that his "reformation or rehabilitation is, in all the known circumstances, of a permanent nature" (*Ex parte* Knox 1962(1) SA 778 (N) at 784).

[3] Law Society of the Cape of Good Hope v C **1986 (1J SA 616** (AJ at 638I-639E; Law Society of the Cape of Good Hope v Berrange **2005 (SJ SA 160** (C) at 1730-1, **(20061** **1 AH SA** **290** (C) at 302

> The very stringency of the test for re-admission is an index to the degree of gravity of the misconduct which gave rise to disbarment. "

[21] As shown in the Applicant's papers, Respondent has practised for a period of at least 3 (three) years without submitting her audit reports; has practiced without a Fidelity Fund Certificate, she has not proffered a semblance of explanation for her apparent failures under the Rules whose contravention she was answerable for; above all, she did not file any opposition and affidavit in answer to the application against her.

[22] The fact that Respondent acted unprofessionally does not lead to her automatic removal from practice.

[23] The legal profession is an honourable profession, which demands complete honesty and integrity from its members. A legal Practitioner is a person from whom the highest standard is expected by the profession, the public and the Court.

[24] The Respondent failed to adhere to this honesty and integrity. It is well established that any legal practitioner who practices without a Fidelity Fund Certificate is committing a professional misconduct.

[25] To sum up, the determination is consequently that the offending conduct has been established on a balance of probabilities.

[26] As a general rule the ultimate sanction of striking off is reserved for attorneys who have acted dishonestly whilst transgressions that don't involve dishonesty are usually visited with the lesser penalty of suspension from practice as mentioned in the recent case of **Legal Practice Council v Lielies** [4]

[27] I am of the view that an order of suspension of the Respondent with certain conditions is an appropriate order.

4. 1119/2020[2022] ZAFSHC18 (8 February 2022)

[28] The Respondent is also not without a remedy. If her books are in order and she is in a position in future to lodge unqualified audit reports for all relevant years, she may well seek relief by way of a *mandamus* to direct the issuing of Fidelity Fund Certificate and lifting of her suspension

[29] In conclusion, the LPC has proven the offending conduct. There cannot be any doubt that the respondent is not a fit and proper person to practise as an attorney in the prevailing circumstances.

ORDER

[30] In the result, I make the following order: -

1) **Zwanette Fourie** is suspended prom the practice as legal practitioner of the High Court of South Africa pending her compliance with the **Legal Practice Act 28 of 2014**.

2) She is directed to immediately surrender and deliver her certificate of enrolment as an attorney to the registrar of this Honourable Court;

3) In the event the Respondent fails to comply with the terms of the order in the preceding paragraph '2', within two weeks from the date of this order, the sheriff of the district in which the certificate is, is authorised and directed to take possession of the certificate, and to hand it over to the registrar of this Honourable Court;

4) The Respondent is prohibited from handling or operating on her trust banking accounts;

5) The Director of the Free State Office of the Applicant is appointed as *curator bonis* (curator) to administer and control the trust accounts of the Respondent, including accounts relating to insolvent and deceased estates and any estate under curatorship connected with

the respondent s practise as an attorney including , also the separate banking accounts opened and kept by respondent at a bank in the Republic of South Africa in terms of Section 86 (I) and (2) of Act 28 of 2014 and or any separate or interest bearing accounts as contemplated by sec 86(3) or sec 86 (4)of Act 28 of 2014 in which monies from such trust banking accounts have been invested by virtue of the provisions of the said sub-sections or in which monies in any manner have been deposited or credited(the said accounts being hereafter referred to as “the trust accounts”), with the following powers and duties:

(a) Subject to the approval of the Board of Control of the Fund to sign and endorse cheques and/or withdrawal forms and generally to operate upon the Trust account(s), but only to such extent and/or for such purpose as may be necessary to bring to completion current transactions in which the Respondent was acting at the date of this order;

(b) Subject to the approval and control of the Board of Control of the Fund to recover and receive and, if necessary in the interest of persons having lawful claims against the Trust account(s) and/or against the Respondent in respect of moneys held, received and/or invested by the Respondent in terms of the aforesaid sections (hereinafter referred to as “Trust moneys”), to take legal proceedings which may be necessary in respect of incomplete transactions in which the Respondent may have been involved and which may have been wrongfully and unlawfully paid from the Trust account(s) and to receive such moneys and to pay same to the creditor of the Trust account(s);

(c) to ascertain from the Respondent’s book of account the names of all persons on whose account the Respondent appears to hold or to have received Trust moneys (hereinafter referred to as “the Trust Creditors”) and to call upon the Respondent to furnish her within 30 (thirty) days from the date of this order, or such further period as he may agree to in writing, with the names, addressed of and amounts due to all Trust Creditors;

(d) to call upon such Trust Creditors to furnish such proof, information and affidavits as she may require to enable her, acting in consultation with and subject to the requirements of the Board of Control of the Fund, to determine whether any such Trust Creditor has a claim in respect of moneys in the Trust account(s) and if so, the amount of such claim;

(e) to admit or reject, in whole or in part, subject to the approval of the Board of Control of the Fund, the claims of any such creditors, without prejudice to such Trust Creditors' right of access to the Civil Courts;

(f) having determined the amounts which, she considers are lawfully due to Trust Creditors, to pay such claims in full, but subject always to the approval of the Board of Control of the Fund;

(g) in the event of there being any surplus in the Trust account(s) after payment of the admitted claims of all Trust Creditors in full, to utilize such surplus to settle or reduce, as the case may be, firstly, any claim of the Fund in terms of section 86(5)(a) of the said Act in respect of any interest therein referred to and secondly, without prejudice to the rights of creditors of the Respondent, the costs, fees and expenses referred to in this order, or such portion thereof as has not already been separately paid by the Respondent to the Applicant and, if there is any balance left after payment in full of all such claims, costs, fees and expenses, to pay such balance, subject to the approval of the Board of Control of the Fund, to the Respondent. If he is solvent, or, if the Respondent is insolvent, to the Trustee of his insolvent estate;

(h) in the event of there being insufficient trust monies in the Trust account(s) of the Respondent in accordance with the available documentation and information, to pay the trust creditors on a pro rata basis. –

i) subject to the approval of the Board of Control of the Fund to close the Trust account(s) and pay the credit balances to the Fund and to require the credit balances to be placed to the credit of a special Trust suspense account in the name of the Respondent in the Fund's books;

ii) to refer the claims of all Trust Creditors to the Board of Control of the Fund to be dealt with in terms of the provisions of the said Act, and

iii) to authorise the Board of Control of the Fund to credit the credit balances referred to in sub-paragraph i) above to its "Paid Claims Account" when the Fund has paid, in terms of section 55 of the said Act admitted claims of the Trust Creditors in excess of such credit balances, provided that, notwithstanding the afore going, the said Board shall be entitled in its discretion, to transfer to its "Paid Claims Account" the amount or amounts of any claim or claims as and when admitted and paid by it;

5.1 Subject to the approval of the Chairperson of the Board of Control of the Fund to appoint nominees or representatives and/or consult with and/or engage the services of attorneys and/or counsel and/or accountants and/or other persons, where considered necessary, to assist such Curator in the execution of the duties of the Curator, and

5.2 To render from time to time, as Curator, returns to the Board of Control of the Fund, showing how the Trust account(s) have been dealt with, until such time as the said Board notifies him that she may regard her duties as terminated.

6. The Respondent is directed to immediately deliver her said accounting records, records, files and documents containing particulars and information relating to:

(a) any monies received, held or paid by the Respondent for or on account of any person while practising as an attorney;

(b) any monies invested by the Respondent in terms of Section 86(3) and/or Section 86(4) of the LPA;

(c) any interest on monies so invested which was paid over or credited to the Respondent;

(d) any estate of a deceased person or an insolvent estate or an estate under Curatorship administered by the Respondent, whether as executor or trustee or Curator or on behalf of the executor, trustee or Curator;

(e) any insolvent estate administered by the Respondent as trustee or on behalf of the trustee in terms of the Insolvency Act, No 24 of 1936;

(f) any trust administered by the Respondent as trustee or on behalf of the trustees in terms of the Trust Property Control Act, No 57 of 1988;

(g) any company liquidated in terms of the Companies Act, no 71 of 2008, administered by the Respondent as or on behalf of the liquidator;

(h) any close corporation liquidated in terms of the Close Corporations Act, 69 of 1984, administered by the Respondent as or on behalf of the liquidator; and

(i) the Respondent’s practice as an attorney of this Honourable Court, to the Curator appointed in terms of this order, provided that, as far as such accounting records, records, files and documents are concerned, the Respondent shall be entitled to have reasonable access to them but always subject to the supervision of such Curator or his nominee.

6.1 Should the Respondent fail to comply with the provisions of the preceding paragraph of this order on service thereof upon her or after a return by the person entrusted with the service thereof that she has been unable to effect service thereof on the Respondent (as the case may be), the sheriff for the district in which such accounting records, records, files and documents are, is empowered and directed to search for and to take possession thereof wherever they may be and to deliver them to such Curator.

6.2 Respondent is hereby removed from office as –

(a) executor of any estate of which Respondent has been appointed in terms of section 14(1) read with section 54(1)(a)(v) of the Administration of Estates Act, No. 66 of 1965 or the estate of any other person referred to in Section 72(1) thereof;

(b) Curator or guardian of any minor or other person’s property in terms of Section 72(1) read with Section 54(1)(a)(v) and Section 85 of the Administration of Estates Act, No 66 of 1965;

(c) trustee of any insolvent estate in terms of Section 59 of the Insolvency Act, No 24 of 1936;

(d) liquidator of any company in terms of Section 379(2) read with 379(e) of the Companies Act, No 71 of 2008;

(e) trustee of any trust in terms of Section 20(1) of the Trust Property Control Act, No 57 of 1988;

(f) liquidator of any close corporation appointed in terms of Section 74 of the Close Corporations Act, No 69 of 1984;

(g) administrator appointed in terms of Section 74 of the Magistrates' Court Act, No 32 of 1944.

[7] The Curator is entitled to:

(a) hand over to the persons entitled thereto all such records, files and documents provided that a satisfactory written undertaking has been received from such persons to pay any amount, either determined on taxation or by agreement, in respect of fees and disbursements due to the firm;

(b) require claimants to provide any documentation or information which the Curator may consider relevant in respect of a claim or possible or anticipated claim, against the Curator and/or Respondent and/or

Respondent's clients and/or fund in respect of money and/or other property entrusted to the Respondent provided that any person entitled thereto shall be granted reasonable access thereto and shall be permitted to make copies thereof;

publish this order or an abridged version thereof in any newspaper he considers appropriate.

(c) close the Respondent's practice insofar it relates to the client files, records and trust accounts;

[8] That the Curatorship will terminate when the Curator receives a final written discharge from such duties from the Applicant consequent upon the Curator filling with the Applicant a final report and account, together with supporting vouchers, in respect of the execution of the Curator's duties in terms of this Order.

[9] The Respondent is hereby directed:

(a) to pay, in terms of Section 87(2) of the LPA, the reasonable costs of the inspection of the accounting records of the Respondent;

(b) to pay the Curatorship fees determined at the rate of R710.00 per hour and disbursements;

(c) to pay the expenses relating to the publication of this order or an abbreviated version thereof;

(d) within 1 (One) year of her being requested to do so by the curator or within such longer period as the curator may agree to in writing, to satisfy the curator by means of the submission of taxed bills of cost or otherwise, of the amount of fees and disbursements due to the Respondent in respect of her former practice and should she fail to do so,she shall not be entitled to recover such fee and disbursements from the curator without prejudice, however, to such rights, if any, as she may have against the trust creditors concerned for payment or recovery thereof and;

(e) to pay the costs of this application.

AS BOONZAAIER, AJ

I agree, it so ordered

NM MBHELE, DJP

For the Applicant: ADV. SETLAI

Instructed by: MOROKA ATTORNEYS