



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

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

Case number: **4543/2018**

In the matter between:

THE LAW SOCIETY OF THE FREE STATE

Applicant

and

IAN SCHROEDER

Respondent

HEARD ON: 28 NOVEMBER 2019

JUDGMENT BY: DAFFUE, ADJP *et* MATHEBULA, J

DELIVERED ON: 29 NOVEMBER 2019

I INTRODUCTION

- [1] The applicant applies to have the respondent's name struck off the roll of attorneys, alternatively that he be suspended from practice. The application is opposed, but as will be indicated soon, counsel for the parties conceded during oral argument that suspension from practice is unavoidable. The only issue that remains to be considered is whether customary orders should be granted such

as the appointment of a *curator bonis* with the usual extensive powers, or respondent be afforded an opportunity to get his financial matters in order within a designated period whereupon the suspension could be uplifted.

II THE PARTIES

- [2] The application was instituted before the commencement of the Legal Practice Act¹ (“the LPA”) and therefore brought in the name of the Law Society of the Free State, a juristic person established in terms of s 56 of the Attorneys Act, 53 of 1979 (“the previous Act”). The Free State Legal Practice Council has substituted the Law Society although applicant failed to do a proper substitution in terms of the Uniform Rules of Court. Nothing turns on this. Adv DM Grewar appeared before us on instructions of applicant’s attorneys, Azar and Havenga.
- [3] The respondent is Mr Ian Schroeder, an attorney admitted as such by this court on 11 April 1996. He practised in Bethlehem, firstly as a sole practitioner, later as director in an incorporated company with other attorneys and eventually as a sole director of his own company. This was the case until he ceased practising in March 2018. He still resides in Bethlehem. He initially tried to represent himself in the proceedings, but wisely decided to make use of his erstwhile attorneys, Lovius Block, who instructed Adv N Snellenburg SC to appear before us.

III HISTORY OF THE LITIGATION

¹ Act 28 of 2014

- [4] The application was already issued on 6 September 2018. A notice of opposition was filed, but respondent's attorneys withdrew from record during November 2018. If applicant was sincere in getting finality, bearing in mind it's allegation that the interests of the public might be in jeopardy, it should have acted with much more vigour and speed.
- [5] Nothing transpired for an extensive period of time *ex facie* the court file until respondent filed his answering affidavit in the beginning of August 2019. This was apparently done upon receipt of a notice of set down. The date stamp of the registrar indicates that the answering affidavit was filed at court on 23 August 2019. I presume that respondent sent his affidavit to applicant's attorneys by e-mail earlier as applicant's replying affidavit was filed on 21 August 2019. The matter, set down for hearing on 10 October 2019, was postponed to 7 November 2019, respondent to pay the wasted costs on a punitive scale.
- [6] On 7 November 2019 respondent appeared and informed the court that Legal Aid refused to grant legal aid to him and that he had taken the decision on appeal. He also explained that he had sold his house and required time to sort out his firm's financial records. The matter was postponed to 28 November 2019 and costs reserved for later adjudication.
- [7] On 28 November 2019 the matter was argued before us. We granted respondent's application to file a supplementary affidavit

and also allowed Mr Grewar to present us with a letter from a Bethlehem firm of attorneys relating to difficulties experienced to obtain clients' files from respondent in matters where his mandates had been terminated. There was no objection to this procedure. More about this later herein.

IV THE UNCONTESTED EVIDENCE

- [8] The last Fidelity Fund Certificate ("FFC") issued to respondent was for the year ending on 31 December 2017.
- [9] Respondent failed to provide applicant with the required audit reports and no FFC's have been issued to him for the 2018 and 2019 years.
- [10] Although it is alleged in the founding affidavit deposed to on 5 September 2018 that respondent is "currently to the best of my knowledge, practising as an attorney", this is denied by respondent who stated that he ceased practising in March 2018. If he was indeed practising as an attorney and continues to do so, that would be a criminal offence.² Instead of challenging respondent's uncontested evidence, applicant's deponent states in the replying affidavit that this is "the first word that the Applicant received from the Respondent with regards to him allegedly not practising as an attorney." This might be so, but the fact remains that respondent's version is unchallenged. It would be so easy, bearing in mind the criminality of practising without a FFC and the interests of the public, to obtain

² S 93(8) of the LPA

evidence from one or more of the applicant's members in Bethlehem.

V LEGISLATION AND AUTHORITIES

[11] Section 22(1) of the previous Act stipulates that an attorney may “on application by the society concerned be struck off the roll or suspended from practice by the court within the jurisdiction of which he practices –

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

[12] In Chapter 4 the LPA provides in detail for disciplinary procedures against legal practitioners accused of misconduct. The powers of the High Court are confirmed in s 44, but the wording of s 22 of the previous Act is not repeated. However the court's authority cannot be doubted.

[13] The application of s 22(1)(d) involves a threefold enquiry as explained in *Law Society of the Cape of Good Hope v Budricks*.³ In my view the same principles apply under the LPA.

[14] The first enquiry is aimed at determining whether the applicant has established the offending conduct relied upon on a balance of probabilities. Secondly, it has to be determined whether the attorney, in the light of the misconduct proven, is not a fit and proper person to continue to practise as an attorney. In considering the second requirement the court exercises a

³ 2003 (2) SA 11 (SCA) at para 2

discretion which in the words of Scott JA in *Jasat v Natal Law Society*⁴:

“... involves in reality a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, a value judgment.”

Finally, and only if it is found that the attorney is not a fit and proper person as mentioned, the court must decide, in the exercise of its discretion, whether the attorney deserves the ultimate penalty of being struck off the roll or whether an order of suspension from practice will suffice.

[15] A Legal Practice Council applying for striking a legal practitioner off the roll does so *custos morum* as the guardian of morals of the legal practitioner’s profession. It performs a public duty. I refer to the well-known judgment in *Solomon v The Law Society of Good Hope*.⁵ The role can also be seen as that of a *nuntius*: it merely places facts relating to alleged unprofessional conduct before the court for consideration by it in order for the court to exercise its discretion as to the appropriateness of a sanction to be imposed in the event of the commission of the transgression being established.⁶

[16] 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. If dishonesty is found, the

⁴ 2000 (3) SA 44 (SCA) at 51E-F; See also Budricks loc cit at 14A

⁵ 1934 AD 401 at 408 – 409

⁶ *Hassim v Incorporated Law Society of Natal* 1977 (2) SA 757 (AD) at 767C –G

circumstances must be exceptional before a court will order suspension instead of striking off. In *Law Society, Cape of Good Hope v Peter*⁷ exceptional circumstances were found.

- [17] In *Summerley v Law Society, Northern Provinces*⁸ Brand JA made it clear that the so-called general rule referred to *supra* cannot be regarded as a rule of the Medes and the Persians and continued as follows:⁹

“The distinction is not difficult to understand. The attorney’s profession is an honourable profession, which demands complete honesty and integrity from its members. In consequence dishonesty is generally regarded as excluding the lesser stricture of suspension from practice, while the same can usually not be said of contraventions of a different kind.

- [18] It was always regarded as trite that an attorney should make it possible for the applicable Law Society to exercise control over him. The attorney must comply with the reasonable requests of the Law Society and non-compliance warrants disciplinary action as it evidences that he/she is not a fit and proper person to practise as an attorney as *inter alia* explained in *Law Society of the Transvaal v Tloubatla*.¹⁰ The principle is *mutatis mutandis* applicable to the relationship between the LPC and legal practitioners in the new era.

- [19] Practising or acting as an attorney without a FFC was prohibited by s 41 of the previous Act and it even constituted a criminal

⁷ [2006] SCA 37 RSA at para 19

⁸ 2006 (5) SA 631 (SCA)

⁹ *Ibid* at para 21

¹⁰ [1999] 4 All SA 59 (T) at pp 67-8

offence in terms of s 83(10) of that Act. The corresponding sections in the LPA are ss 84 and 93(8).

[20] The duties of an auditor appointed as a representative of the former Attorneys' Fidelity Fund in terms of the Free State Law Society rule 16B are well-known and do not have to be mentioned.

[21] Rule 54 of the South African Legal Practice Council Rules¹¹ are now applicable. These Accounting Rules appear to be stricter than the previous rules of the different Law Societies. The relevant fund is now known as the Legal Practitioners' Fidelity Fund.

[22] In order to invoke any breach of the former rule 16B or present Accounting Rules, it is incumbent upon the applicant to show, on a preponderance of probabilities, that the delinquent defaulter was practising law as an attorney at all times material to the period of the misconduct complained of.

VI EVALUATION OF THE EVIDENCE IN LIGHT OF THE LEGISLATION AND AUTHORITIES

[23] It cannot be found that respondent practised without a FFC, save perhaps from January to March 2018. It is apparent from the papers and the manner in which applicant approached the matter, not only relating to this respondent, but to other practitioners as well, that some leeway is granted to obtain FFC's after the deadline.

¹¹ Published in GG 41781 of 20 July 2018

- [24] It cannot be found that respondent wilfully ignored applicant's letters and the instruction to attend the disciplinary hearing. Annexures "A" to "C" of the founding affidavit are circulars to unknown members of applicant and there is no indication that any of these circulars were sent to respondent. The deponent does not state that he personally did that. In any event, it was not his task. Respondent denies having received these letters and explained the circumstances in which he found himself at the time. His version cannot be rejected as false. His denial has not been met in the replying affidavit with proof of service.
- [25] Applicant did not prove any dishonesty or other serious misconduct that warrants respondent's striking off the roll. It is not applicant's case that complaints from the public have been received. Mr Grewar was intent in persuading us to grant a striking off order, but eventually received instructions to merely ask for respondent's suspension and the appointment of a *curator bonis*, together with customary ancillary relief.
- [26] Respondent cannot be allowed to practise as an attorney without a FFC and Mr Snellenburg has correctly conceded this. He is not a fit and proper person to continue to practise as an attorney at this stage. If we allow respondent to practise, we would be condoning a criminal offence being committed in terms of s 93(8) of the LPA. The public's interest must specifically be protected. Unfortunately, experience has taught us that in most cases of failure to file audit reports, trust shortages, including even serious financial mismanagement, are encountered.

- [27] I was initially of the view that suspension from practice should be ordered, but instead of appointing a *curator bonis* with the usual vast powers, respondent should be afforded time – say four months – to get his financial records and book-keeping in order and to comply with all requirements of applicant, where after he might approach the court to uplift the suspension. However, the contents of the letter of NiemannGrobbelaar handed in during oral argument by agreement caused me to change my mind. Respondent has been refusing for a considerable time to hand over clients' files to this firm in respect of clients who had terminated his mandate. I also acknowledge that on respondent's version – how doubtful that may seem – his landlord with whom he is involved in a legal battle, refuses him access to his records and files. It would therefore be impossible for respondent to comply with any conditions of suspension on the basis as I anticipated.
- [28] The only option left is to issue an order suspending respondent from practice with the usual ancillary relief granted in such instances. If respondent is able to show that he can overcome his difficulties, he would be entitled to approach the court to have the suspension set aside. If irregularities such as financial misconduct and/or any other serious transgressions are found by the *curator bonis*, applicant would be entitled and obliged to approach the court again for a striking off order.

VII THE ORDERS

Therefore the following orders are made:

1. The Respondent is suspended from practice until such a time that he obtains his Fidelity Fund Certificates for the years 2017/2018, 2018/2019 and 2019/2020 and thereafter successfully applies to this Court for the upliftment of his suspension.
2. 2.1 Respondent is ordered to surrender and deliver to the Director of the Free State Provincial Office of the South African Legal Practice Council ("the Director") in Bloemfontein his certificate of enrolment as an attorney.
- 2.2 Should Respondent fail to comply with the provisions of the preceding sub-paragraph of this order within 2 (two) weeks from date thereof, the Sheriff of the district in which such certificate of enrolment is found, is empowered and directed to take possession thereof and deliver same to the Director.
3. Respondent is ordered to deliver his books of account, records, files and documents containing particulars and information relevant to:

- 3.1 any moneys received, held or paid by the Respondent for or on account of any person;
- 3.2 any moneys invested by the Respondent in terms of Section 86(3) and/or Section 86(4) of the Legal Practice Act, No 28 of 2014 (hereinafter referred to as “the Act”);
- 3.3 any interest in moneys so invested, which was paid over or credited to the Respondent;
- 3.4 any estate of a deceased person, or any insolvent estate, or any estate placed under Curatorship of which the Respondent is the Executor, Trustee or Curator, or which the Respondent is administering on behalf of the Executor, Trustee or Curator of such estate; and
- 3.5 the Respondent's practice as an attorney,

to the *curator bonis* (“Curator”) appointed in terms of paragraph 9 hereof, provided that as far as such book of account, records, filed and documents are concerned, the Respondent shall be entitled to have access to them, but always subject to the supervision of such Curator or a nominee of such Curator.

- 4. Should the Respondent fail to comply with the provisions of the preceding paragraph of this order within 1 (one) week

after service thereof upon him, or after a return by a person entrusted with the service thereof that he has been unable to effect service thereof on the Respondent, as the case may be, the Sheriff of the district in which such books of account, records, files and documents are, is empowered to take possession thereof and deliver them to such Curator.

5. Such Curator shall be entitled to hand over to the persons entitled thereto all such records, files and documents as soon as she has satisfied herself that the fees and disbursements in connection therewith have been paid or satisfactorily secured or that same are no longer required by the Curator.
6. A written undertaking by a person to whom the records, files and documents referred to in paragraph 5 above are handed, to pay such amount as may be due to the Respondent, either on taxation or by agreement, shall be deemed to be satisfactory security for the purposes of the preceding paragraph hereof, provided that such written undertaking incorporates a *domicilium citandi et executandi* of such person.
7. Such Curator is empowered to require that any such file, the contents of which she may consider to be relevant to a claim, or possible or anticipated claim, against her and/or the Respondent and/or the Respondent's clients, and/or the Legal Practitioners' Fidelity Fund (herein referred to as "the Fund") in respect of money and/or other property entrusted to the Respondent, be re-delivered to such Curator.

8. The Respondent is interdicted and prohibited from operating on his trust account(s) as defined in paragraph 9 hereof.
9. The Director, being Ms Tumelo Leope, or nominee, is appointed as Curator to administer and control the trust account(s) of the Respondent, comprising of the separate banking accounts opened and kept by the Respondent at a bank in terms of Section 86 of the said Act and/or any separate savings or interest-bearing accounts as contemplated by Section 86(3) and/or Section 86(4) of the said Act, (including accounts opened in accordance with the corresponding sections of the repealed Attorneys Act, 53 of 1979) in which moneys from such trust banking accounts have been invested by virtue of the provisions of the said sub-section or in which moneys in any manner have been deposited or credited (the said accounts being herein referred to as "The trust account(s)") with the following powers and duties:
 - 9.1 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;

- 9.2 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);
- 9.3 to ascertain from the Respondent’s book of account the names of all persons on whose account Respondent appears to hold or to have received Trust moneys (hereinafter referred to as “the Trust Creditors”) and to call upon 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;
- 9.4 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;

- 9.5 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;
- 9.6 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;
- 9.7 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;

9.8 in the event of there being insufficient trust moneys in the Trust account(s) to pay the claims of Trust Creditors reflected in the books of account of the Respondent in full –

9.8.1 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;

9.8.2 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

9.8.3 to authorise the Board of Control of the Fund to credit the credit balances referred to in sub-paragraph 9.8.1 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;

9.9 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

9.10 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.

10. The Respondent is hereby directed:

10.1 to pay the fees and expenses of the Curator, such fees to be assessed at the applicable rate as determined by the Board of Control of the Fund, including travelling time;

10.2 to pay the reasonable fees and expenses charged by any persons consulted and/or engaged by the Curator as aforesaid;

10.3 within 1 (one) year of him 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 costs, or otherwise, of the amount of the fees and disbursements due to the Respondent in respect of his former practice, and should he fail to do so, he shall not be entitled to recover such fees and disbursements from the Curator without prejudice, however, to such rights, if any, as he may have against the Trust Creditors concerned for payment or recovery thereof.

11. That Respondent is hereby removed, during the period of suspension, from office as -

11.1. executor of any estate of which respondent has been appointed in terms of 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);

11.2. 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;

11.3. trustee of any insolvent estate in terms of section 59 of the Insolvency Act, No 24 of 1936;

- 11.4. liquidator of any company in terms of section 379(2) read with section 379(e) of the Companies Act, No 61 of 1973;
 - 11.5. trustee of any trust in terms of section 20(1) of the Trust Property Control Act, No 57 of 1988;
 - 11.6. liquidator of any close corporation appointed in terms of section 74 of the Close Corporation Act, No 69 of 1984; and
 - 11.7. administrator appointed in terms of section 74 of the Magistrates' Court Act, No 32 of 1944;
12. Applicant shall be entitled to re-enrol this application for removal of Respondent's name from the roll of practitioners should the Respondent not obtain his Fidelity Fund Certificates for the years 2017/2018, 2018/2019 and 2019/2020 by 30 June 2020.
13. Respondent is ordered to pay the costs of this application, including the costs of 7 November 2019 that stood over for later adjudication, on the attorney and client scale.

J.P. DAFFUE, ADJP

I concur

MA MATHEBULA, J

On behalf of applicant: Adv. DM Grewar
Instructed by:
AZAR & HAVENGA INC
BLOEMFONTEIN

On behalf of respondent: Adv N Snellenburg SC
Instructed by:
LOVIUS BLOCK
BLOEMFONTEIN