

IN THE HIGH COURT OF SOUTH AFRICA

CASE NUMBER: I2992/2017

In the matter between:

PAULOS LEPEKOLA SAMUELS

APPLICANT / RESPONDENT *a quo*

and

THE LAW SOCIETY OF THE NORTHERN^R RESPONDENT / APPLICANT *a quo*
PROVINCES

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED.

12/3/18 DATE

Jelly SIGNATURE

APPLICATION FOR LEAVE TO APPEAL – JUDGMENT

TLHAPI J

[1] This is an application for leave to appeal an order of 23 March 2017 and is based on the amended application for leave to appeal dated 6 September 2017, to the full bench of this court. The order for which leave was sought relates to Part A of the Notice of Motion and the order reads:

"1. The respondent is suspended from practice pending the finalization of an Application in Part B of the Notice of Motion and the relief set out in 1.3 to 1.12"

[2] The application was based on the following grounds that the findings

were erroneous in several respects and that there were reasonable prospects that another might find differently:

- "1 ...erred in failing to place any or sufficient weight on the fact that the respondent had in a letter of 11 January 2016, replied substantially to the applicant's previous letters.
- 2erred in finding that the applicant proved that there was misappropriation of trust funds and a trust deficit.
- 3erred in failing to place any or insufficient weight on the fact that on 18 November 2016 the appellant had undertaken to hold its file in abeyance
- 4 ...erred in failing to place any or insufficient weight on the fact that contrary to what was stated by the applicant in the founding affidavit, the respondent had accounted to Ms Mabaso and paid her the balance due after deducting his fees
- 5erred in failing to place any sufficient weight on the fact that the respondent had given notice of taxation to Ms Mabaso
- 6 ...erred in failing to place any or insufficient weight on the respondent's version which could not be disputed, that Ms Mabaso had rejected the contingency fee agreement and that the respondent was accordingly entitled to deduct his fees from the amounts recovered from the fund
- 7 Another court may reasonably find that the respondent's conduct was justified in light of the communication from the applicant of 18 November 2016. In this regard the learned judge erred in finding that the respondent was not entitled to rely on the letter for the holding of an inspection in abeyance until the action was finalised between him and Ms Mabaso
- 8erred in ordering the relief sought in paragraph 1.3 to 1.12 of the notice of motion, which is final in effect and which is inconsistent with an order of suspension from practice pending an application to strike off
- 9erred in finding that the respondent's reliance on the letter written by Mrs Van Zyl would negate the purpose for which the application was established and failed to place any weight on the respondent's acceptance of that letter as excusing him from further action until the issues between him and Ms Mabaso had been finalised.
- 10 ...erred in finding that the respondent had attempted to thwart and frustrate the inspection of his trust account.
- 11 ...erred in finding that the respondent had admitted that there was a misappropriation of trust funds and that there existed a trust deficit when in fact no such admission was made;
- 12erred in finding that the respondent had failed to satisfy the court that the applicant's allegations of misappropriation of trust funds and a trust deficit were not justified
- 13erred in finding that the matter was urgent and in not striking it from the roll with costs especially when Ms Mabaso's complaint had been pending since October 2015 and the applicant a year later had indicated to the respondent that the applicant would pend its file.
- 14 Another court may reasonably find that the matter was not urgent and the respondent ought to have been afforded a proper opportunity to deal with the allegation, especially when the respondent's career and profession was at stake.

- 15 ...erred in finding that the application was urgent on the basis that the respondent delayed and frustrated the process of inspection and/or investigation.
- 16erred in finding that since the applicant did not have the advantage of a full report by Mr Faris it would be appropriate to suspend the respondent from practice on an urgent basis to enable a full inspection to be engaged for the purpose of determining his removal from the roll of practicing attorneys as envisaged in Part B of the Notice of Motion

[3] Counsel for the applicant submitted that the first issue to determine was whether the order granted was appealable. He contended that having regard to the relief sought in paragraphs 1.3 to 1.12 of Part A of the notice of motion, although the order was an interim one it was 'final in effect and not susceptible to alteration by the court of first instance; it was inconsistent with an order for suspension from practice pending an application to strike off; that the order granted definite and distinctive relief and that it had the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. The order he argued satisfied the test laid down in paragraph [25] in *JR 209 Investments (Pty) Ltd and Another v Pine Villa Country Estate (Pty) Ltd; Pine Villa Country Estate Pty Ltd v JR 209 Investments (Pty) 2009 (4) SA 302 (SCA); South African Informal Traders Forum and Others v City of Johannesburg and Others 2014 (4) SA 317 (CC) paragraphs [20] and [30]; Zweni v Minister of Law and Order 1993 (1) SA 523 (A) at 532 to 533B.*

[4] Counsel for the respondent was not in agreement that the order stood on all fours with the test and argued that the application ought to be dismissed. He referred to two 2006 matters which were heard in the Mahikeng division where the points *in limine* were upheld, *Maseka v Law Society of the Northern Provinces 443/2006 ZANWHC 53* and *Mogami and Mabuse v The Law Society of the Northern Provinces 2006*. He contended that the interim order was not final in effect because the entire order was repeated in Part B and that the order was susceptible to alteration by the court of first instance; the interim order did not finally dispose of any relief in Part B. Having regard to the orders in Part A it is my view that some of the orders sought were final in effect and this shall be addressed below in dealing with the inspection of the accounting records prior to the launch of this application.

[4] Both counsel were in agreement on the law applicable being Council's statutory right of inspection of the trust accounts of practitioners and of the practitioner's duty and obligation to comply with directions in terms of section 70 of the Act. A refusal to comply

constitutes unprofessional conduct and entitles the Council of the Law Society to investigate, *Maseka supra*; *Mothuloe Incorporated Attorneys v Law Society of the Northern Provinces and another*. In *South African Informal Traders Forum and Others, supra*, paragraph [20] the court stated that each consideration of the appealability of an interim order depended upon the factual setting, whether the hearing of the appeal will serve the interests of justice.

[5] It was contended that having instituted defamatory action against Ms Mabaso it was reasonable for him to have assumed that the matter between himself and the respondent was *sub judice* and that an investigation into his records was premature. It is further contended that the applicant held this view because of the communication from Mrs Van Zyl from the respondent's office, that the enquiry into his accounting records would be held in *abeyance pending the finalization of the defamation action*. It was also contended for the applicant that the respondent had failed to launch an application to compel the applicant to produce his accounting records and that a refusal to permit inspection did not justify the inspection. Counsel for the respondent contended that Council did not agree to hold the matter in abeyance and that it followed through with a decision of council to launch this application subsequent to Mrs Van Zyl's letter.

[6] In my view Counsel for the respondent was correct in arguing that the civil action had no connection to the investigation, however, in considering how other matters were dealt with and as a result of Mrs Van Zyl's letter another court may find that the applicants view was justified. In *Maseka supra* there launching of the application to suspend was preceded by an application to compel his account records. In the initial hearing among the complaints was a refusal by Mr Maseka to have his books inspected, and it was suspected as a result of complaints that he had misappropriated trust funds. In *Mathuloe supra* when he tried to prevent the inspection of his accounting records, the Law Society countered with an application to compel the production of his records. In these circumstances the orders as sought in Part A would have been justified because the inspection had established a *prima facie* case of impropriety.

[7] As contended by counsel for the applicant, the nature of the orders sought in Part A of this application were final in effect. In my view they are suggestive of an inspection having

been established first, that the court was placed in a position where it could engage the three stages of enquiry and be proof had to be on a balance of probabilities before a decision to suspend was given, *The Law Society of the Northern Provinces v Mogami & Mabuse 2010(1)SA 186 (SCA) at paragraph [4]*. In my view another court may find that it necessary to have conducted an inspection first and that was not appropriate to suspend the applicant prior to such inspection being conducted.

[7] In the result the following order is given:

1. The applicant is granted leave to appeal his order of suspension to the full bench of this division.
2. Costs to be in the appeal.



V.Y Tlhapi
Judge of the High Court Gauteng, Pretoria

Appearances:

For the applicant / respondent: Adv. Strathern SC
Adv. Comuzio

For the respondent / applicant: L. Groome

Instructed by: PL Samuels Attorneys

Date heard: 06 September 2017

Date delivered: 12 March 2018