



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

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

Case number: 5293/2015

In the matter between:

THE LAW SOCIETY OF THE FREE STATE

Applicant

And

MKHOSI CONFIDENCE RADEBE

Respondent

CORAM: RAMPAL, J *et* CHESIWE, AJ

HEARD ON: 12 MAY 2016

JUDGMENT BY: CHESIWE, AJ

DELIVERED ON: 09 JUNE 2016

INTRDOCUTION

- [1] In this application, the applicant primarily seeks an order whereby the respondent's name is struck off the roll of attorneys of this court, or alternatively, that the respondent be suspended from practice for such a period and on such conditions as the honourable court may deem first. The respondent opposes the application.
- [2] The application is brought in terms of section 22(1)(d) of the Attorneys Act 53 of 1979 which provides that:
- 22(1) *"Any person who has been admitted and enrolled as 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 or she practices....."*
- (d) *"If he, on the discretion of the court, is not fit and proper person to continue to practice as an attorney."*
- [3] The respondent was admitted as an attorney of this court on 23 July 2009. He commenced to practice as a sole practitioner from May 2011 under the name and style of MC Radebe Attorneys in Ficksburg.
- [4] The application is brought on the grounds that the respondent has failed to properly administer the deceased estate of the late Mafusi Rebecca Phomodi.

BACKGROUND TO THE APPLICATION

[5] That on or about 8th October 2013, the applicant received a written complaint against the respondent from a Mr Abraham Phomodi. The complaint was that the respondent who was appointed as the executor had failed to properly administer the estate of the late Mafusi Rebecca Phomodi. The complaint was based on the alleged delays by the respondent to finalise the estate, the fees that the respondent charged, the respondent's failure to reply to letters from Mr Phomodi and the unauthorised utilisation of funds for personal practice expenses to the total value of R31 000,00 in the estate of the late Mafusi Rebecca Phomodi.

[6] The applicant notified the respondent of the complaint levelled against him. The respondent's response was that Mr Phomodi was not an heir to the estate and that any communication with him was out of courtesy. Furthermore that the finalisation of the estate was delayed due to the heirs' failure to respond to all the correspondence send to them on 10 June 2015.

On 8th of July 2015 the respondent appeared before the Disciplinary Committee (DC), where various documents were provided by the respondent himself.

The documents included, amongst others, statements for cheque account [4.....] and savings account [9.....]. Both accounts were held at ABSA Bank. The bank statements showed various withdrawals from the bank accounts by the respondent as well as various deposits made by the respondent.

- [7] During the DC hearing the respondent voluntarily admitted that he had withdrawn money from the estate account to pay for the business expenses of his practice, but that he had since paid back all the money he had withdrawn. The respondent informed the DC that he had also applied to the Magistrate High Court to be removed as an executor of the estate.
- [8] After the hearing, the committee was of the view that the respondents transgressions where of a serious nature and consequently the committee resolved that the matter be referred to the Law Society Council for a decision. The council held their meeting on 28 August 2015. At that meeting the respondent was represented by Adv Snyman. The minutes of the meeting are attached as FA15 page 205 – 207 of the record. The council resolved to bring an application to have the respondent struck off or suspended.

APPLICATION FOR POSTPONEMENT

- [9] On 25 February 2016 the respondent brought an application for postponement which was granted by the honourable court and the matter was postponed to 12 May 2016. The court granted the respondents application for the postponement. The court order read as follows:
- That the applicant in the main application to make discovery of all documentation, if any in possession of the applicant regarding the Barnaschone matter or before 4 March 2016.

- That the respondent in the main application to file his application for leave to file further affidavits to the main application on or before 11 March 2016.
- That the applicant in the main action files an opposing affidavit to the application, for leave to file further affidavits, on or before 18 March 2016.
- That the respondent in the main action file his replying affidavit to the applicant's opposing affidavit in the application for leave to file further affidavits, if any, in or before 23 March 2016.
- The application for leave to file further affidavits, if any, be heard on 31 March 2016.
- The respondent in the main application to pay wasted costs accumulated as a result of the postponement.

[10] In response to the court order, the president of the applicant, Mrs Milton, filed an affidavit dated 4 March 2016, in which she explained that the applicant could traced no records relating to its erstwhile member, Barmaschone.

THE ISSUES

[11] The first issue in this application is whether or not the respondent is a fit and proper person to continue practicing as an attorney as envisaged in section 22 of the attorneys Act 53 of 1979. The

second issue, which arises only if the first issue is negatively determined, is what the appropriate sanction should be imposed on the respondent.

THE APPLICANT CASE

[12] Mr Buys on behalf of the applicant submitted in oral arguments and Heads of Arguments that the respondent is unworthy to remain in the profession and that the public needs to be protected from such an attorney. Mr Buys quoted the case of **Malan and Another v Law Society**¹. He argued that the respondent confirmed his transgression and also lied to the disciplinary committee. The respondent also failed to attend or to respond to the objections as raised by the Master of the High Court. Mr Buys submitted that the respondent continued to make withdrawal from the estate accounts even five days before the disciplinary committee hearing.

[13] He argued that the behaviour of the respondent clearly indicated that he had no moral lapses. He contended that the respondent's behaviour was contrary to the behaviour of a fit and proper attorney. The respondents' actions were serious and amounted to theft or fraud. As a result of the respondents' behaviour, he failed to properly exercise his fiduciary duty towards the heirs of the deceased estate. Mr Buys made reference to section 22(1)(d) which envisages a three staged enquiry. This enquiry will be discussed in more detail below. Mr Buys concluded by saying

¹ Northern Provinces 2009 (1) SA 216 (SCA) at para 4

that there was no better sanction than to strike the respondent's name, off the roll of attorneys.

THE RESPONDENT'S DEFENCE

[14] Mr Snyman appearing on behalf of the respondent pointed out in oral arguments and Heads of Argument that, at the council meeting questions were raised by certain members of the applicant's council concerning the applicant's handling of the Barnasetone matter. Mr Snyman argued that unlike many similar matters, in this matter the respondent stood up as a man and openly acknowledged his mistakes. He made reference to the case of **Burdicks**² which stipulates the guiding enquiry of the threefold principle. He argued that the respondent implicated himself by acknowledging his mistakes. Mr Snyman pointed out that for a year the applicant set with the complaint and did nothing, which poses the question whether the applicant was not concerned about the complaint.

[15] Mr Snyman submitted that in the case of **Summerley**³, the attorney was struck off the roll on account of dishonesty. In this case, however, the respondent has fully disclosed his transgressions and paid back the money, which shows good character on the part of the respondent. He further submitted that, the Master of the High Court has appointed the respondent

² Law Society of Good Hope V Budricks 2003 (2) SA 11 (SCA) at paragraph 13 as well as KZN Law Society v Van Rooyen [2009] JOL 23222 (KNP at page 13

³ Summerley v Law Society, Northern Provinces 2006 (9) SA 613 (SCA) at paragraph 17.

in other matters which involved larger amounts. Mr Snyman made reference to the matter of **Peter**⁴ – a case with similar offences; the attorney was only suspended for a period of one year, since there are mitigating factors which will allow the court to deviate from the usual. He submitted that, the applicants' failure to immediately interdict the respondent after the complaint was lodged, shows that the applicant did not regard the respondent as an attorney who posed serious threat to members of the public whose interest must be protected from an attorney with really bad moral character.

[16] Mr Snyman brought it to the courts attention that, even though it is not stated in pleadings, the applicant proceeded to issue the respondent with a new Fidelity Fund Certificate for the current year, in spite of the pending application before court. This, he said, confirmed that the respondent's trust accounts are clean and in order.

[17] Mr Snyman concluded that the respondent should not be struck off the roll of attorneys as there are mitigating factors present. He stressed that each case must be decided on its own facts. He then submitted that the peculiar circumstances of this particular matter indicated that, notwithstanding his transgression, which he frankly acknowledged with great remorse. The respondent was still a fir and proper person to practise as an attorney. Therefore, counsel urged us to determine the issue in favour of the respondent. He relied on the case of *Law Society v Peter*⁵.

⁴ *Law Society of the Cape of Good Hope v Peter* reported as 2009 (2) SA 18 (SCA).

⁵ *Law Society of the Cape of Good Hope v Peter* 2009 (2) SA 18 (SCA) at para [19]

THE LAW

[18] According to Jasat v Natal Law Society 2000 (3) SA 44 (SCA)⁶, section 22(1)(d) of the Attorneys Act⁷ envisages a three stage enquiry which is namely:

- (1) *Whether the alleged conduct has been established on balance of probabilities (a factual enquiry)*⁸.
- (2) *Whether the person concerned, in the discretion of court, is not fit and proper person to continue to practice*⁹.
- (3) *Whether in all circumstances the person in question is to be removed from the roll of attorneys or whether an order of suspending him from practice for a specified period will suffice*¹⁰.

[19] In terms of section 58 of the Attorneys Act¹¹ the objectives of the law society are to:

- (a) *maintain and enhance the prestige, status and dignity of the profession;*

⁶ *Jasat v Natal Law Society 2000 (3) SA 44 (SCA)* at para 10. See also *Malan and Another v Law Society, Northern Provinces 2009 (1) SA 216* and *General Council of the Bar of South Africa v Geach and Others 2013 (2) SA 52 (SCA)* at para [50]

⁷ Attorneys Act 53 of 1979

⁸ *Jasat v Natal Law Society* above at para [10]

⁹ *Ibid*

¹⁰ *Ibid*

¹¹ *Jasat v Natal Law Society* above.

- (b) *to regulate the exercise of the profession;*
- (c) *to encourage and promote efficiency in and responsibility in relation to the profession;*
- (d) *to deal with all matters relating to the interest of the profession and to protect those interests;*
- (e) *to uphold the integrity of the practitioners;*
- (f) *to uphold and improve the standards of professional conduct and qualifications of practitioners;*
- (g) *to provide for the effective control of the professional conduct of practitioners;*
- (h) *to promote uniform practice and discipline among practitioners;*
- (i) *to encourage the study of the law;*
- (j) *to initiate and promote reforms and improvements in any branch of the law, the administration of justice, the practice of the law and in draft legislation;*
- (k) *to represent generally the views of the profession;*
- (l) *in the interests of the profession in the Republic, to co-operate with such other societies or bodies of persons as it may deem fit.*

[20] It is trite that applications of this kind are of a disciplinary nature and are still considered *sui generis*¹². The Law Society in this instance is the *custos morum* of the legal profession¹³. It merely gathered the facts and placed them before court for consideration¹⁴.

¹² *Malan and Another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) at 226A.

¹³ *Kaplan v Incorporated Law Society, Transvaal* 1981 (2) SA 762 (T) at 777F

¹⁴ *Hassim v Incorporated Law Society of Natal* 1977 (2) SA 757 (A) at 767C-G. See also *Cirota and another v Law Society Transvaal* 1979 (1) SA 72 (A) at 187H

[21] The question is whether an attorney is a fit and proper person as contemplated in terms of section 22 (1)(d) of the Act is not dependent upon factual findings but lies in the discretion entrusted to the court of law¹⁵. The phrase fit and proper “does not contain two distinct ideas. It is an expression of wide import. Its meaning has to be determined in the context within which it is used. In this particular instance that context is the legislation that is applicable to attorneys. The context of the section and the broad context of the statute must be borne in mind regarding being had to the scope and purpose of the legislation.

[22] In Kaplan v The Law Society Transvaal above¹⁶ the court stated that:

‘The indications are therefore that the expression “fit and proper person” in 515 relates to the personal qualities of an applicant. The expression is also used in 522 which authorises the court to strike an attorney off the roll or suspend him from practice of the court is satisfied that he is not a “fit and proper person” to continue to practice as an attorney.’

APPLICATION OF THE LAW TO THE FACTS

[23] The applicable principles of striking off an attorney are stated clearly in section 22 (1)(a) of the Attorneys Act¹⁷ which provides

¹⁵ Law Society of Cape of Good Hope VC, 1986 (1) SA 610 (A) at 637C-E and See also Law Society of Transvaal v Matthews.

¹⁶ See footnote 9 at 783G-H.

¹⁷ Section 22(1)(a) of the Attorneys Act states that:

that any person who has been admitted and enrolled as an attorney may on application by the Law Society concerned be struck off the roll or suspended from practice by the court, if in the discretion of the court, he is not a fit and proper person to continue to practise as an attorney¹⁸.

[24] To reiterate, the decision in **Jasat v Natal Law Society**¹⁹ case the court contemplated a three stage enquiry. Firstly the court must decide whether the alleged offending conduct has been established on a balance of probabilities, which is a factual enquiry. Seeing that the respondent acknowledge his transgressions, the factual enquiry requires no further consideration. On his own admission the offending conduct has been established on a balance of probabilities. Therefore, the first leg of the enquiry is satisfied. The misconduct has been proven.

[25] Secondly, the court must consider whether or not the person concerned, in the discretion of the court, is a fit and proper person to continue to practise. This involves a weighing up of the conduct complained of against the conduct expected of an attorney. As far as the second leg of the enquiry is concerned,

-
- i. if he or she is no longer a South African citizen;
 - ii. in the case of a person who is not a South African citizen, other than a person contemplated in subparagraph (iii), if he or she has failed to obtain a certificate of naturalization in terms of the South African Citizenship Act, 1949 (Act No. 44 of 1949), within a period of six years from the date on which he or she was admitted to the Republic for permanent residence therein, or within such further period as the court may for good cause allow;
 - iii. in the case of a person referred to in item (bb) of section 15 (1) (b) (ii), if he or she is no longer a citizen of any state referred to in that item, or has ceased to belong to a category of persons or to comply with conditions determined in terms of that item;

¹⁸ Ibid.

¹⁹ *Jasat v Natal Law Society* above.

the Act contemplates that where an attorney is guilty of unprofessional or dishonourable or unworthy conduct different consequences may follow. The conduct in other instances may be not that serious and the Law Society may exercise its disciplinary powers by imposing a fine or reprimanding the attorney. This does not however mean that the court is powerless if it finds the attorney guilty of unprofessional conduct. The court may discipline the attorney by suspending him from practice with or without reprimanding²⁰.

[26] Thirdly the court must decide whether in all the circumstances the person in question is to be removed from the roll of attorneys. The third leg is a matter of discretion of the court, this will depend upon the factors presented before court, and the extent to which it reflects upon the persons character or shows him to be unworthy to remain in the ranks of an honourable profession, the repetition of such conduct and the need to protect the public. If the court finds that a person is not fit and proper to continue practice 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 there are grounds to assume that after the period of suspension, the person will be fit to practice as an attorney, then the court would not ordinarily remove such a person, but will order an appropriate suspension.

[27] The implications of an order to remove an attorney from the roll for misconduct are serious in nature. Such an order ordinarily is not made unless the court is of the opinion that the misconduct in

²⁰ *Law Society of the Cape Good Hope v C* 1986 (1) SA 616 (A) at 638I- 639E.

question is of a serious nature and that it will manifest as character defect or moral lapse and lack of integrity²¹. In the matter of **A v Law Society of the Cape of Good Hope**²² the court was of the view that any order of suspension must be conditional upon the cause of unfitness e.g. if an attorney is unfit because of the inability to keep proper books, the conditions of suspension must deal with that inability. In that case, as in this matter the respondent acknowledged that he handled the funds of the deceased estate inappropriately. The respondent, therefore, will need to have proper measures in place when he has to deal with deceased estate accounts.

The respondent in this regard relied on the judgment of **Summerly v Law Society, Northern Province**²³ which sets out the guidelines for sanction as follows:

“As a general rule, striking off is reserved for attorneys who have acted dishonestly, while transgressions not involving dishonesty are usually visited with a lesser penalty of suspension from the practice.”

[28] Obviously if a court finds dishonesty, the circumstances must be exceptional before court will order a suspension instead of removal. The respondent placed the following exceptional circumstances before the court justifying why he should be suspended, rather than be struck off the roll. He has been practising as a sole practitioner since May 2011. He has not been found guilty of any other misconduct by the applicant. This

²¹ *Ex parte Wilcocks* 1920 TPD 243 at 245

²² *A v Law Society of the Cape of Good Hop* 1989 (1) SA 849 at 852 E-G

²³ *Summerly v Law Society, Northern Province* 2006 (5) SA 613 SCA.

incident represents his first transgression. He is the sole breadwinner, as his wife is employed by him. He was forced to terminate the employment of other staff in his practice due to insufficient income. He committed the transgression not to satisfy his selfish greed for money, but to meet the basic expenses his new practice and financial obligations towards his employees. He has shown great remorse for his transgressions. He has fully reimbursed the estate of the monies he had withdrawn. The heirs and creditors of the estate did not suffer actual loss. All the same he admitted that there was potential prejudice in his actions. He has, out of his own accord, removed himself from office as executor without seeking payment in respect of an executor's fee or disbursements he incurred in the administration of the estate concerned.

- [29] To sum up the respondent is young and relatively inexperienced in the running of an attorney's office. It was irregular and unethical of him to abuse the funds of the estate and not give proper account to the heirs. He admitted his mistakes, which indicates a measure of remorse. He has not attempted to deceive the applicant nor the court. In the matter of **Law Society of the Cape Good Hope v C**²⁴, Galgut AJA said with regard to the implication of a striking-off order.

"The implication of a striking-off order are serious and far reaching. Such an order envisages that the attorney will not be re-admitted to practice unless the court can be satisfied by the clearest proof that the applicant has genuinely reformed, that a considerate time has

²⁴ *Law Society of the Cape Good Hope v C* above.

lapsed since he was struck off, and that probability is that, if reinstated, he will conduct himself honestly and honourably in future.”

[30] We have considered the peculiar circumstances of the misconduct. We are not convinced that a proper case has been made out to justify the finding that the respondent is no longer a fit and proper person to continue practicing as an attorney.

[31] We have weighed up the respondent’s conduct against the conduct expected of a prudent attorney. We found the conduct of the respondent to be wanting. However, his deviant conduct did not, in our view, stem from an inherently irreparable character defect. It appends to us that, given a chance, he would probably redeem himself and prudently conduct himself in an honourable manner as a fit and proper attorney is expected to. In the light of all those considerations we are inclined to exercise the discretion entrusted to us in favour of the respondent as regards the second leg of the enquiry. This then is our value judgment. *Jasat, supra*, at 51C-G.

[32] It is also trite that in the third leg of the enquiry the court has to determine whether the respondent’s name must be permanently struck off from the roll or whether the respondent must be temporarily suspended from practice²⁵. In **Law Society of the Cape of Good Hope v Peter**²⁶, the respondent experienced financial problems and misappropriated R20 000.00 to cover expenses of her practice. The court held that the theft was not

²⁵ *Law Society of Cape of Good Hope v Buddricks* above.

²⁶ *Law Society of the Cape of Good Hope v Peter* above.

the result of a character defect inherent in her but rather a moral lapse brought about by the pressure she had been under. The respondent in that matter was only suspended from practice.

[33] In this matter before us, the respondent admittedly made withdrawals from the estate account of the deceased. The respondent acknowledged that he had no intention of stealing the funds, but always intended to pay back all the money he took from the estate account²⁷. The deposits he made supported his averments. That tended to diminish the moral blame worthiness of his action. He did not have the *mala fide* criminal intent to permanently deprive the estate the actual benefit of its funds. Although he acknowledged that the transgression were of a serious nature, he submitted that that despite the applicant being aware of his transgressions for one year, the applicant still allowed him to continue to practice without interdicting him. In his opinion, the failure to interdict him clearly demonstrates that the applicant did not consider him unfit to practice as an attorney. Mr Snyman also submitted that the respondents trust account is clean; the general running of the practice is immaculate and neither the estate nor the heirs to the estate had suffered any prejudice.

[34] The applicant in this matter sought the ultimate disciplinary sanction against the respondent that he be struck-off the role of attorneys. Such a sanction would be excessively severe and harsh. Moreover, it would not be in keeping with the conclusion we have already reached in respect of the second leg of the

²⁷ Paragraph 35.1, page 245 of the opposing affidavit of respondent.

enquiry. It seems to me that, in all the circumstances, a suspended sanction would be an appropriate punishment to the respondent for the misconduct he committed.

[35] The question of costs, the applicant in the notice of motion and founding affidavit asked for costs on an attorney and client scale. I am inclined to order the respondent to pay costs on the requested basis. The applicant was well within its rights to bring the application.

[36] Accordingly the following order is made:

- (1) The respondent is suspended from practising, as an attorney for his own account, of this court for a period of 12 months starting from 1 October 2016.
- (2) The respondent may, during the period of suspension, to practise as a professional assistant but shall not practise for his own account or as a partner with any other attorney.
- (3) The respondent is directed to pay the applicant's costs of the application on the scale as between attorney and client.

S CHESIWE, AJ

I concur

MH RAMPAL, J

On behalf of applicant: Adv JJ Buys
Instructed by:
EG Cooper Majiedt Inc.
Bloemfontein

On behalf of respondent: Adv C Snyman
Instructed by:
Honey Attorneys
Bloemfontein

/PK