FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No. : 2208/2013

In the matter between:-

THE LAW SOCIETY, FREE STATE Appellant

and

ABRAM SEABE NTHAKO Respondent

CORAM:	KRUGER *et* RAMPAI, JJ
JUDGMENT BY:	KRUGER, J
HEARD ON:	20 MARCH 2014
DELIVERED ON:	27 MARCH 2014

[1] This is an application to have respondent's name struck off the roll as an attorney. The principal reason is that, having stopped to practice as an attorney, respondent has failed to lodge a final closing down trust audit report in terms of Rule 3B. The respondent says he stopped practising as an attorney on 9 December 2009. The respondent submitted his trust audit report in terms of Rule 16B to the applicant for the years 2009/2010 during 2010 but failed to lodge a final or closing-down trust audit report as required by Rule 3B to the applicant.

[2] This application was launched in June 2013. In December 2013 the matter came before Moloi J who placed the parties on terms as to the filing of answering and replying affidavits, and postponed the matter to 13 February 2014. The answering affidavit was filed on 15 January 2014. Therein the respondent says it is his intention to comply with Rule 3B but he does not have the know-how when it comes to accounting matters. He does not say when he intends to comply, or what steps he has taken to get accountants or auditors to help him. On 13 February 2014 the matter was by agreement postponed to 20 March 2014, the date we heard the matter.

[3] At the outset of the hearing before us Mr Ponoane, for respondent, asked whether there was any point for the court to continue with the application in view of the fact that the Rule 3B certificate was apparently lodged with the applicant last week. In the heads of argument, which were obviously drawn by the respondent himself, the following appears in paragraph 13:

> "... I indicated that the certificate of closure and or report will be finished by the end of January 2014 and wish to inform the Honourable Court that an independent Chartered Accountant from Makomota Investment Holdings has finalized the report and certificate on closure after being referred there by Dele Accountants. It is my humble submission that this is an indication that I did not fail or refuse to submit Rule 3B Certificate on closure. I would like to inform the Honourable Court that the trust account has been closed."

The respondent in the heads of argument refers to paragraphs 16.3 to 16.6 of his answering affidavit which was filed on 15 January 2014. Obviously at the time respondent's heads of argument were filed on 14 March 2014 the Regulation 3B certificate had not been filed. There is no indication in the heads of argument that the Rule 3B certificate has been filed. We asked Mr Williams, who appeared for the applicant at the hearing about the filing of the Rule 3B certificate, and he said apparently something had been filed, but he had not seen it and he understood that it was not satisfactory. No supplementary affidavit was filed by the respondent attaching the alleged certificate, and nothing is before us. All we have is the history of the matter evidencing delays unexplained by the respondent.

[4] It is important to bear in mind that the conduct of the respondent complained about is not merely that he did not file the Regulation 3B certificate, it is that for about four years he failed to do so.

[5] One of the points argued on behalf of the respondent relates to paragraph 11 of the founding affidavit, where the deponent says that the application is being brought in terms of section 18 of the Attorneys Act 53 of 1079. The deponent says in paragraph 11:

> "I submit that the Respondent is clearly not a fit and proper person to practice as an attorney. The Applicant is therefore entitled to bring this application in terms of Section 18 of the Act. The Respondent's conduct by not responding and not appearing before the Disciplinary Committee in itself amounts to unbecoming conduct, which warrants the Respondent to be struck off the roll of attorneys."

In the answering affidavit the response to this paragraph reads as follows:

> "Save to admit that the Applicant can bring the application in terms of Section 18 of the Act, the rest of the paragraph is denied and the Applicant is put to proof of same."

[6] Mr Williams, for the applicant, conceded at the outset of his argument in court that the reference in the founding affidavit to section 18 was wrong, and said the application is being brought in terms of section 22(1)(d). As we pointed out to Mr Ponoane who appeared for the respondent, there can be no doubt that this is an application for striking off. The Notice of Motion does not refer to any section of the Act. The fact that a deponent to a founding affidavit refers to an incorrect section cannot affect the substance of the matter. The founding affidavit is not part of the order made by the court. The respondent knows that the purpose of this application is to have him struck off the roll. The matter is made worse for the respondent by virtue of the fact that in the answering affidavit he finds no fault with the reference to section 18 in the founding affidavit. Only in the heads of argument is the point taken.

[7] The applicant's deponent sets out the history of the matter as follows in the founding affidavit:

7.1 On 9 December 2009 the respondent was requested to submit a certificate from his auditors relating to the closure of his practice by 15 January 2010.

7.2 On 14 January 2010 respondent wrote to applicant that his auditors would ask for an extension for submission of the final trust audit report.

7.3 On 11 May 2010 the respondent was once again requested to comply with Rule 3B in a letter served on the respondent by the Sheriff.

7.4 The respondent was granted until 30 July 2010 to comply with Rule 3B and to submit the closing down report.

7.5 On 28 July 2010 the respondent appeared before the compliance and Disciplinary Committee (the CDC) of the applicant regarding his failure to comply with Rule 3B as well as on other matters.

7.6 The respondent was asked whether he would be able to comply with Rule 3B by 30 July 2010 to which he replied that he would attend to the matter immediately.

7.7 On 18 August 2010 the matter was again on the roll of the CDC. The respondent had still not complied and the CDC referred the matter to the Council of the applicant in terms of Rule 19(3)(c) for its decision.

7.8 According to the founding affidavit there should be an amount of about R100 000 in respondent's trust account, whereas according to the audit report filed by the respondent for the 2009/2010 year, a surplus of R110,50 was reflected.

In the answering affidavit the respondent says the amount of R100 000 is factually incorrect and misleading, and he puts applicant to the proof.

7.9 On 2 November 2012 the sheriff served a notice on the respondent to appear before the Council on 23 November 2012 to provide reasons why he should not be struck off. Certain correspondence was exchanged with the respondent.

7.10 The respondent failed to appear before the Council on 23 November 2012 and the Council resolved to bring the present application to strike him off the roll. In the answering affidavit respondent says on that day he left a message with the receptionist at the Council's offices and asked her to inform Mr Mohobo that he would not be able to attend (the respondent does not say what reasons, if any, he furnished).

[8] The deponent to applicant's founding affidavit submits that by not responding and not appearing before the disciplinary committee, respondent has shown himself not to be a fit and proper person to practice as an attorney.

[9] In the replying affidavit the deponent says that the respondent has failed to communicate with the applicant since 28 July 2010.

[10] Regarding respondent's answer to the eight complaints by his former clients detailed in the founding affidavit, respondent says that he struggles to get assistance from accountants, and

whenever he gets someone to assist him, that person makes promises to him they do not keep.

[11] In reply the applicant points out that the respondent provides no details, and that the various accountants allegedly approached are not identified, nor are dates provided as to when they were contacted.

[12] In paragraph 16.5 of the answering affidavit the respondent says:

> "My intention is to comply with Rule 3B but I respectfully submit that I do not have the know-how when it comes to accounting matter and I cannot just close the trust account and say I am done with practicing when there are rules to follow. If those who have the know-how in accounting and auditing frustrate me and my efforts to provide the requested information and report, I could not do anything but continue to look for someone who was willing to assist me as a matter of urgency."

In paragraph 16.6:

> "Just to mention the previous year only, I obtained the services of Moloi Incorporated and Associates. I instructed then to write to the applicant as a matter of urgency and during our communications I was informed that the letter had been written. When I was about to submit documents, I was informed by Moloi Incorporated and Associates that they are waiting for the renewal of practice. I got frustrated, started to make calls all over and ultimately I got somebody from Dele Accounts who was willing to assist me. His indication was that they will be done with the closing reports by the end of January 2014 and I felt thrilled. I am not refusing to provide closing report and I am not failing because my intention is to ensure that this is behind me. It is my humble submission that my situation does not

make me unfit or improper person. The Applicant was aware of my challenges and from the letters that I sent through to them about postponements and requests that the Auditors made through me but they turned a blind eye. I also made then aware of that I have to find somebody to assist me with closing certificate."

[13] In the replying affidavit the applicant responds as follows to these two paragraphs:

"3.4 What respondent is effectively saying is that in 2013 he obtained the services of Moloi Incorporated, who would have written a letter on his behalf to Applicant. No such letter was ever received. Thereafter "somebody" (once again unidentified) from Dele Accounts was approached who indicated that the closing down Trust Audit report will be finalised by the end of January 2014. Once again no confirmation letter or affidavit from Dele Accounts is attached.

Furthermore, various other non-significant correspondence from respondent is annexed to the opposing affidavit. All the salient letters he refers to in the paragraph under reply are, however, missing. The reason, they never existed."

[14] The disdain with which respondent treated applicant and his professional obligations appears from paragraph 10 of the answering affidavit:

"Safe to admit that I was supposed to appear before the Council on the 23rd of November 2012 but I wish to indicate to the Honourable Court that on that day I made a call to the Applicant's workplace through my cell phone and I spoke to the receptionist lady who informed me that Mr Mohobo was in a meeting. I told her to inform Mr Mohobo that I will not be able to attend and she indicated that she will convey the message."

The respondent, on the day of his hearing before the Council, he does not say at what time, possibly while the Council is already in session, tells the receptionist to say he will not be coming. He does not say what reason, if any, he gave to the receptionist.

[15] In the founding affidavit the applicant refers to seven complaints against the respondent. In the replying affidavit the applicant says that the respondent has explanations with regard to every complaint, and that it is not the task of this court to determine the validity of the complaints.

[16] Applicant's case is based on the fact that the respondent has for four years failed to comply with his duty in terms of Rule 3B. In applicant's submission this is in itself sufficient for a finding that the respondent is not a fit and proper person to practice as an attorney.

[17] Mr Williams, for applicant says the court must enquire whether in all the circumstances the respondent's name should be removed from the roll of attorneys. Before that question can be answered two other questions are asked: has the offending conduct been established on a preponderance of probabilities, and is he a fit and proper person to continue to practice – **Jasat v Natal Law Society** 2000 (3) SA 44 (SCA) par [10], quoted and confirmed in **Malan and Another v Law Society, Northern Provinces** 2009 (1) SA 216 (SCA) par [4]. The main consideration is the protection of the public (**Malan**-case par [7]). Mr Williams says the respondent has displayed a continuous pattern of disregard in respect of his obligations, with reference to **Prokureursorde van Transvaal v**

Landsaat 1993 (4) SA 807 (T) at 814E-G, where the court asks the rhetorical question whether a person who has over a 10 year period conducted unacceptable book-keeping practises is a fit and proper person to be on the roll of attorneys and be allowed to continue to practice. The judges find he is not. Mr Williams refers to **Law Society for the Cape of Good Hope v King** 1995 (2) SA 887 (T), where the court found that the respondent was a poor and hapless office manager and was well-nigh reckless in the manner in which he permitted his office affairs to become more and more disorganised. But he had talent, and served the poor and needy (at 897D-F). In **King's** case the order was that the respondent was not allowed to practice for his own account. Mr Williams also refers to **Law Society, Cape v Visser** 1965 (1) SA 523 (C) at 525 E- 526 D where it appears that the respondent did not give attention to the Law Society's requests for explanations. There were also other complaints against the respondent.

[18] Mr Ponoane submits that in this matter there was no dishonesty and there is no public outcry that the respondent should be removed from the roll. His other argument is that the application is brought under the incorrect section of the Attorneys Act, namely section 18 where it should have been section 22(1)(d).

[19] Nothing turns on the incorrect reference to section 18 in the founding affidavit. The heading to section 18 is – "Admission and readmission of notaries and conveyancers". It does not apply to attorneys. Section 22 deals with "Removal of attorneys from roll". The important point is that applicant does not in the notice of motion refer to any section of the Act. It is a

striking off application. The respondent at all times understood that this is an application to have his name struck off the roll for failure to comply with Rule 3B.

[20] The respondent has made himself guilty of repeated and extended flouting of the duties imposed upon an attorney. He simply decided not to attend a meeting of applicant's council. He failed to get a Rule 3B certificate over a number of years. If his books were in order, that would be a simple matter for any accountant. The authorities make it clear that dishonesty is not a prerequisite for striking off. The conduct of the respondent, also in the manner he conducted this case, in failing to provide details of persons and dates, and at the date of the hearing seeking to allege that he has complied without the alleged Rule 3B certificate having been seen or considered by Mr Williams or the court, illustrates that he is not a fit and proper person to continue practise as an attorney as contemplated in section 22(1)(m) of the Attorneys Act 53 of 1979.

[21] **ORDER**

An order is granted in terms of prayers 1 -12 of the Notice of Motion. In terms of prayer 2, the applicant's name is to be struck off the Roll of Attorneys.

A. KRUGER, J

I agree.

M.H. RAMPAI, J

On behalf of appellant: Adv A. Williams
Instructed by:
Ramothello, Raynard & Tsotetsi Inc.
BLOEMFONTEIN

On behalf of the respondent: Mr M.J. Ponooane
Instructed by:
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