FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Application No. : 5528/2010

Ex parte
In the matter between:-

THE LAW SOCIETY OF THE FREE STATE	Applicant
and	
FUSI STEPHEN MACHEKA	1st Respondent
MOLISE CECIL CHABANE	2nd Respondent

CORAM: EBRAHIM, J *et* LEKALE, AJ

HEARD ON: 24 FEBRUARY 2011

JUDGMENT BY: LEKALE, AJ

DELIVERED ON: 23 JUNE 2011

INTRODUCTION AND BACKGROUND:

[1] The respondents practised as attorneys until the 29th July 2010 and the 11th June 2009 respectively when the following orders were made at the instance of the applicant:

A. **Ad first respondent Case No. 2777/2010**

“2. Respondent is struck off the roll of attorneys of the Free State High Court, Bloemfontein;

...

4. The respondent to deliver his books of account, records, files and documents containing particulars and information to the curator appointed in terms of prayer 10 hereof...”

B. **Ad second respondent Case No. 2273/2009**

“Accordingly the respondent is struck off the roll of attorneys and a further order is granted in terms of Prayers 2 to 11 of the notice of motion.”

(Prayers 2 to 11 relate to the appointment of the curator and the delivery of the second respondent’s books of account and files to the said curator, among others.)

[2] On the 6th May 2010 the respondents registered a close corporation under the name Macheka Chabane Legal Services (“the close corporation”) with its registered office at the address from which the first respondent used to practise as an attorney

before he was struck off (first and second respondents are members of the close corporation). Its registered principal business is the provision of legal services. It is the operation of this close corporation that gave cause to the present proceedings.

RULE *NISI*:

[3] On the 5th November 2010 this court (Jordaan J) issued a rule *nisi*, returnable on the 9th December 2010, calling upon each respondent to show cause, if any, why:

3.1 he should not be interdicted from continuing to practise as an attorney, or to hold himself out to be an attorney or to render legal services for or in expectation of any fee, gain or reward, direct or indirect, to himself or any other person;

3.2 he should not be found to be in contempt of the orders referred to in paragraph [1] above.

[4] The provisional order, further, directed that the interdicts operate as interim orders.

[5] The rule *nisi* was extended on numerous occasions at the instance of the respondents with the question of costs standing over for determination at a later stage by agreement between the parties.

A: **<u>INTERDICT:</u>**

<u>APPLICANT'S CONTENTIONS:</u>

[6] In these proceedings the applicant seeks confirmation of the provisional order on the basis that the respondents continue to practise as or hold themselves out to be lawfully admitted attorneys and that the first respondent failed to hand over all the files of his erstwhile practice in compliance with the court order.

[7] In support of its contention that the respondents continue to practise as attorneys the applicant relies on the letterhead of the close corporation which lists civil and criminal litigation, conveyancing and divorce matters as some of the services which the respondents render as well as the files and the court

processes found on the premises of the close corporation.

[8] In respect of its contention that the first respondent failed to comply with the court order, the applicant relies on the files found at the offices of the close corporation as well as the first respondent's admission that some of those files are the **"files of those clients who did not want to migrate to other attorneys or [to] take them"** and **"files of clients that [he] completed their mandates and they were indebted to [him]"**.

<u>RESPONDENTS' CONTENTIONS:</u>

[9] In opposition of the application the respondents deny that they continue to practise as attorneys or that they hold themselves out to be attorneys or that they render legal services in contravention of the Attorneys Act, No. 53 of 1979 ("the Act").

[10] First respondent relies on the affidavits deposed to by the former clients of his erstwhile practice and some members of the close corporation's support staff in his contention that he

complied with the court order in respect of the files and that he does not profess to be an attorney.

[11] The second respondent, on his part, relies on his constitutional right to freedom of trade, occupation and profession as the basis for his submission that the terms of the interdict prayed for by the applicant are too broad.

ISSUES RAISED:

[12] It is clear from the respondents' opposing papers and submissions that they are aware that they, as persons whose names have been struck off the roll of attorneys, are not entitled to practise as attorneys or to hold themselves out to be attorneys. The question is whether or not they continue to practise as such or hold themselves out to be attorneys. The main issue in this regard is whether or not they are entitled to render legal services for a fee, gain or reward either for themselves or any other person regard being had to the provisions of section 22 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") relating to the right to

choose trade, occupation or profession freely.

[13] It is, further, common cause between the parties that the relevant court orders required each respondent to hand over to the curator all the files inclusive of those in respect of which they were entitled to a fee. The first respondent submits that he transferred the relevant files to the close corporation which started operating before he could be served with the striking off application. According to him this occurred after he realised that his days as an attorney were numbered and after informing his clients accordingly. The question which arises in this regard is whether or not the first respondent was in possession and/or control of the relevant files as at the date of the order striking him off the roll of attorneys and requiring him to deliver his books of account and files to the curator.

<u>COMMON CAUSE AND UNDISPUTED FACTS:</u>

[14] The second respondent concedes that civil and criminal litigation are traditionally reserved for and associated with advocates and attorneys and that he knows of no-one, other

than an attorney, who is able to be admitted and practise as a conveyancer.

[15] The first respondent feels that a writ of execution, which has not yet been issued by the clerk of the court, is not a court process but cannot take the matter further on the question whether or not such a document relates to or is required or intended for use in any other proceedings in a court of civil jurisdiction as contemplated by section 83(8)(a)(v) of the Act.

[16] Mr. Williams, appearing for the applicant, correctly concedes that the interim order restraining each respondent from rendering legal services for a fee, gain or reward is too wide but reiterates that section 22 of the Constitution expressly provides that the practise of a trade, occupation or profession may be regulated by law. The applicant is accordingly constitutionally correct in seeking to protect the interests of the attorneys' profession.

APPLICABLE LAW:

[17] Section 83(1) of the Act prohibits any person other than an attorney from practising or holding himself out to be an attorney or from pretending to be, or making "use of any name, title or addition or description implying or creating the impression that he is" an attorney.

[18] The Act, further, reserves certain legal work for attorneys by, *inter alia,* criminalising the drawing up or preparation of some documents for a fee, gain or reward by people who are not attorneys. (See section 83(8)(a) of the Act.)

[19] The list of documents which may only be prepared or drawn up by an attorney for a fee, gain or reward includes:

> **"(v) Any instrument or document relating to or required or intended for use in any action, suit or other proceeding in a court of civil jurisdiction within the Republic."**

(See section 83(8)(a)(v) of the Act.)

[20] In an application for a final order, the applicant must show, on a balance of probabilities, a clear right, an injury to that right

which has actually been committed or a reasonable apprehension that such an injury could ensue and the absence of any other alternative ordinary remedy which can yield the same result. (See **SETLOGELO v SETLOGELO** 1914 AD 221 at 227 and **V & A WATERFRONT PROPERTIES (PTY) LTD AND ANOTHER v HELICOPTER & MARINE SERVICES (PTY) LTD AND OTHERS** 2006 (1) SA 252 (SCA).)

FINDINGS:

[21] We are persuaded by the material before us that the close corporation's letterhead probably creates an impression, in the mind of a reasonable person, that the respondents, as the members or "directors" of the close corporation, are attorneys who are *inter alia* entitled to litigate civilly and criminally and who are also conveyancers.

[22] We are, further, satisfied on a balance of probabilities that in preparing or drawing up documents such as a request for default judgment and warrants of execution against property the respondents, as the "directors" of the close corporation, did so

in expectation of a fee, gain or reward directly or indirectly for themselves through the close corporation. We are convinced that, in so doing, the respondents performed the duties traditionally reserved for attorneys. The first respondent's submissions that he did not sign the relevant documents in his capacity as a member or "director" of the close corporation and that the documents in question were not issued by the clerk of the court do not help the respondents' case at all because the Act proscribes the preparation and/or drawing up of such documents for a fee, gain or reward and not the issuing or signing of the same. The documents in question are, in our finding, required or relate to or are intended for use in proceedings before a court of civil jurisdiction. As an indication thereof we were referred to the heading "Costs" on the writ of execution where an amount of R3 013,78 has been inserted. Such costs can only be claimed where attorneys are involved.

[23] The respondents, therefore, invade the clear right which the applicant has of protecting the interests of the attorneys' profession and its object of maintaining and enhancing the

prestige, status and dignity of that profession. (See section 58 of the Act.)

[24] We are, further, satisfied that there is no ordinary remedy available to the applicant which can produce the relief sought in circumstances where the interests and dignity of the profession are at stake and are compromised on a daily basis, as in the present case.

[25] In conclusion we are satisfied, as correctly conceded on behalf of the applicant, that an order restraining the respondents from rendering legal services for a fee or reward as prayed for in the Notice Of Motion is so general and so wide that it infringes on the respondents' constitutional right to freedom of trade, occupation and profession as contended for by the second respondent. In the court's view, not all legal services are reserved for attorneys. The applicant, as the custodian of the attorneys' profession, is entitled, in terms of section 22 of the Constitution read with the provisions of section 58 of the Act, to regulate the attorneys' profession by, *inter alia*, reserving work

for the profession. An appropriate order, in our view, is one which qualifies the legal services that the respondents, as persons whose names have been removed from the roll of attorneys, are prohibited from rendering.

B: **CONTEMPT OF COURT ORDER:**

[26] The applicant further seeks orders declaring each respondent to be in contempt of the striking off orders and for an order committing them to prison.

[27] In support of these prayers the applicant, *inter alia*, cites the alleged failure by the first respondent to surrender all the files of his erstwhile practice to the curator in compliance with the relevant court order.

[28] The crime of contempt of court consists in unlawfully and intentionally disobeying a court order. (See **S v BEYERS** 1968 (3) SA 70 (A).)

[29] The test for whether or not disobedience of a civil order

constitutes contempt is whether the breach was committed **"deliberately and *mala fide*"**. The requirements are that the refusal to obey the order should be both wilful and *mala fide*. (See **FAKIE NO v CCII SYSTEMS (PTY) LTD** 2006 (4) SA 326 (SCA) at 333 C – E.)

[30] In the proceedings seeking the committal of the alleged offender to prison for contempt of a court order the applicant, as the prosecutor, must establish the existence of the order, its service on the respondent and non-compliance with the same. Once the aforegoing have been established the evidentiary burden shifts to the respondent alleged offender to raise a reasonable doubt as to whether non-compliance was wilful and *mala fide*. Failure on the part of the respondent to adduce evidence raising a reasonable doubt results in the offence having been proved beyond reasonable doubt. (See generally **FAKIE NO v CCII SYSTEMS (PTY) LTD**, *supra*, at 338 E – G.)

[31] The first respondent effectively disputes that he failed to comply with the relevant order. It is, therefore, incumbent on the applicant to establish this element of the crime beyond

reasonable doubt. The only evidence presented to the court by the applicant on this aspect of the dispute is the fact that the files of the first respondent's erstwhile practice were discovered at the offices of the close corporation long after the relevant order was made and after the first respondent had purported to comply with it by surrendering closed files in the main.

[32] The first respondent's explanation is that he disposed of those files in favour of the close corporation before the relevant order was made.

[33] If the first respondent's explanation is reasonably possibly true he is entitled to an acquittal. (See **S v VAN DER MEYDEN** 1999 (2) SA 79 (W).)

[34] In order to return a verdict of not guilty the court does not have to believe the version of the first respondent, as the accused, in all its details. If it is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. (See **S v SHACKELL** 2001 (4) SA 1 (SCA) at 12 J – 13 A – B.)

[35] In the court's view the first respondent's version is reasonably possibly true. It is possible that when he foresaw the real threat of being struck off the roll of attorneys, he threw the proverbial javelin by divesting himself of the relevant files in favour of the close corporation before the lightning could strike. There is no evidence before the court to prove that the relevant files were handed over to the close corporation after the date of the relevant order. The relevant order applies prospectively and affects only those files which were in the first respondent's possession or under his control as an attorney as at the 29th July 2010.

[36] The matter, however, does not rest there. The applicant further contends that the respondents are in contempt of the relevant orders because they continue to practise as attorneys or hold themselves out to be attorneys. This contention is not supported by any direct evidence before the court. On the papers the applicant appears to draw the conclusion that the respondents continue to practise as attorneys or hold

themselves out to be attorneys from a number of factors such as the fact that the close corporation conducts business from the premises which used to house the first respondent's erstwhile practice, the description of the services which the respondents render as set out in the close corporation's letterhead, the court processes prepared by the first respondent, the costs claimed in those court processes and the fact that the close corporation employs a professional assistant as well as the legal qualifications of the respondents appearing on the close corporation's letterhead. In the context of contempt proceedings the court can only draw such an inference if it is the only reasonable inference that can be drawn from such facts. (See **R v BLOM** 1939 AD 188.) The second respondent, effectively, submits that they, qua the members of the close corporation, only lay the necessary foundation, using their legal training and background, before they hand over to practitioners to perform that legal work which can only be carried out by attorneys. The fact that exorbitant costs, which can only be claimed by or where attorneys are employed, are claimed in the court processes, however, negates the drawing of such a conclusion as a reasonable inference. The only reasonable inference to draw from these facts is, in our view, that the respondents continue to practise as attorneys or, at the very least, that they hold themselves out to be attorneys. The question is, however, whether or not it is reasonably possibly true that, when they pronounced in the close corporation's letterhead that they, *inter alia*, do civil and criminal litigation as well as conveyancing and claimed costs in court processes as if attorneys were involved, the respondents did not intend to hold themselves out to be attorneys and, thereby, act wilfully and *mala fide* but intended to market their referral services in those areas and to claim what was legally due to their clients as vigorously submitted by the respondents.

[37] A closer look at the relevant court processes reveals that the writs of execution direct the sheriff to effect payment to the "Execution Creditor's Attorneys". Although some processes are signed by the respondents' clients, they were prepared by the first respondent and the respondents, as former attorneys, knew or could reasonably be expected to have known that the

relevant costs could only be claimed by or where attorneys were employed.

[38] It is therefore not reasonably possibly true that the respondents did not act wilfully and *mala fide* when they made the relevant assertions in the letterhead and claimed the costs in question. The guilt of the respondents has, as such, been proved beyond reasonable doubt. The second respondent's culpability arises from the close corporation's letterhead which reflects his name as a "director" and his deposition in the opposing affidavit where he effectively identifies himself with and defends the said letterhead among others.

[39] In his oral submissions and Heads of Argument, Mr. Williams requests that once a finding of guilty has been made, the matter be postponed for determination of an appropriate sentence.

[40] The court is in respectful agreement with Mr. Williams and feels that it does not have sufficient information before it to determine the sentence.

COSTS:

[41] The applicant prays for an order for payment of costs on the scale as between attorney and own client. The court can only award such punitive costs in special circumstances. There are no special considerations advanced in this matter to justify the making of such an order. (See **SNYMAN v SENTRABOER** 1988 (3) SA 919 (O); **BOVUNGANA v ROAD ACCIDENT FUND** 2009 (4) SA 123 (E) at 133 G – H.)

[42] It is not disputed by the respondents that the postponements were attributable to them.

[43] There is no cause both in law and equity for a departure from the general rule pertaining to costs.

ORDER:

[44] In the result orders 2.1, 2.2, 2.3 and 2.4 of the rule *nisi* are confirmed subject to the qualification that the first and second respondents are prohibited from rendering legal services reserved for attorneys in terms of the Attorneys Act No. 53 of

1979 and any other applicable law.

[45] The imposition of sentence in respect of the contempt proceedings stands over for determination after the following events:

45.1 The respondents shall deliver their representations on sentence, if so advised, within seven days of the date hereof by filing same with the Registrar and serving copies on the applicant's attorney of record;

45.2 The applicant, on its part, shall deliver its answering representations, if any, within seven days after receipt of the respondents' representations by filing the same with the Registrar of the court and serving copies on the respondents' at their appointed address. Each respondent shall file a reply, if any, within three days after receipt of the applicant's representations by filing same with the Registrar of the court and serving a copy on the applicant's attorney.

[46] The first and second respondents are ordered to pay the costs

of the application, inclusive of the wasted costs, jointly and severally, the one paying, the other to be absolved on a scale as between party and party.

L.J. LEKALE, AJ

I concur.

S. EBRAHIM, J

On behalf of appellant:	Mr. A. Williams Instructed by: Phalatsi & Partners BLOEMFONTEIN
On behalf of first and second respondents:	In person c/o Hadebe Attorneys NBS Building 2 Elizabeth Street BLOEMFONTEIN

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