

SOUTH AFRICA / JUDGMENT

Cape Bar Council v Noordien (14514/2012) [2013] ZAWCHC 138 (30 August 2013) [2013] ZAWCHC 138

COURT

Western Cape High Court, Cape Town

BEFORE

J I Cloete, N J Yekiso

CASE / FILE NUMBER

14514/2012

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IN THE HIGH COURT OF
SOUTH AFRICA
(WESTERN CAPE HIGH
COURT, CAPE TOWN)

Case no: 14514/2012

THE CAPE BAR COUNCIL

.....Applicant

v

ABUBAKER NOORDIEN

.....Respondent

Court:

Judge Yekiso et Judge Cloete

Heard: 7

June 2013 and 16 August 2013

Delivered:

30 August 2013

JUDGMENT**CLOETE J:**

The applicant applies for an order striking the name of the respondent from the roll of advocates and for ancillary relief. The respondent is not a member of the applicant but its locus standi derives from the provisions of s 7(2) of the Admission of Advocates Act No 74 of 1964 ('the Act'). The application is based on the provisions of s 7(1)(d) of the Act. These stipulate that a court may suspend any person from practice as an advocate, or order that the name of any person be struck off the roll of advocates, if it is satisfied that he or she is not a fit and proper person to continue to practice as an advocate.

The application was launched on 27 July 2012 and is opposed by the respondent. When the matter first came before us on 7 June 2013 it was postponed at the instance of the respondent who sought an opportunity to obtain legal representation. At our direction the respondent deposed to an affidavit before the matter was postponed in which he confirmed that he had made all of the necessary arrangements to secure the services of both an attorney and senior and junior counsel to represent him on the postponed date. He further gave an undertaking not to practice as an advocate pending the outcome of the application. It was on that basis that we granted a final postponement until 16 August 2013. When the matter was heard on that day the respondent however appeared in person. In the period between 7 June 2013 and 16 August 2013 the respondent had launched two separate applications under case no: 9864/2013 in an apparent attempt to stave off the hearing of the present application. The aforementioned attempt was unsuccessful and the two applications were dealt with in accordance with the ruling that we made on 16 August 2013 under case no: 9864/2013. Also unsuccessful was the respondent's application to strike out certain portions of the applicant's replying affidavit. Not only did the portions concerned deal with allegations made by the respondent himself in his answering affidavit, but he also availed himself fully of the applicant's invitation to reply thereto by filing a lengthy supplementary affidavit.

Much of the content of the respondent's affidavits was directed at attacks on the constitutionality of the so-called referral rule. This issue has already been decided by the Supreme Court of Appeal in *De Freitas and Another v Society of Advocates of Natal and Another* 2001 (3) SA 750 (SCA) where it was found that the referral rule is not unconstitutional. As such the respondent's attacks require no further comment, save to refer to certain aspects of his conduct insofar as the referral rule is concerned within the context of the

complaints against him.

The respondent was admitted as an advocate by order of this court on 5 March 2004. He practiced continuously as an advocate but not as a member of the applicant until furnishing the aforementioned undertaking on 7 June

2013. To the best of the applicant's knowledge the respondent still remains on the roll of advocates.

This application arises from separate complaints made to the applicant by two members of the public on 25 November 2010 and 23 April 2012 respectively.

The first complaint was duly investigated by the applicant who concluded that there was prima facie evidence constituting serious professional misconduct on the part of the respondent, including that he: (a) accepted a brief directly from a member of the public to act for reward in a criminal matter without the intercession of an attorney (i.e. that he breached the referral rule); (b) accepted the instruction when the client was already represented by another advocate without the latter having been informed thereof or his mandate having been terminated; (c) 'forum-shopped' in a bail application in the magistrate's court for the same client, despite the availability of the magistrate seized with the matter; and (d) failed to provide the services that he had undertaken to provide, despite having received payment in

advance. The complaint relating to 'forum-shopping' was later abandoned by the applicant after further investigation revealed that the respondent had approached another magistrate on the instruction of a prosecutor.

In his response to the applicant about the complaint the respondent maintained inter alia that he had represented the client concerned on the instruction of a firm of attorneys, R Petersen and Associates. The respondent subsequently settled the matter directly with the complainant and reimbursed her a portion of the amount that she had paid. However this does not detract from the nature of the conduct complained of; nor does it excuse the respondent's dishonesty and his misleading of this court. In his answering affidavit the respondent again stated, but this time under oath, that he had indeed been instructed by R Petersen and Associates. It was only when he was confronted in reply with the affidavits of both Mr Petersen and the latter's candidate attorney at the time, a Mr Kubukeli, denying the existence of any such instruction, that the respondent delivered a further affidavit in which he admitted that no such instruction had ever been given. He sought however to excuse his conduct in previously lying to this court under oath by stating that 'I therefore admit the possibility... that I did not get a chance to get to Mr Petersen in the... matter, but it was always my intention to get him to instruct me'. The respondent's views on his duties as an advocate and an officer of the court became even more disturbing when he was given the opportunity to testify during the hearing before us. I will return to this aspect later in this judgment.

The second complaint was similarly investigated by the applicant which also had recourse to the record of the proceedings in the form of the contents of the relevant magistrate's court file (including the magistrate's notes). The second complainant's affidavit read with the record of the proceedings indicated at least the following conduct on the part of the respondent, namely that he: (a) accepted instructions directly from the second complainant to represent her son in criminal proceedings for reward, and accepted payment in advance in respect of such services; (b) represented to the magistrate seized with the matter that he was appearing on the

instructions of an attorney – the same Mr Petersen – while this was not the case;

- (c) withdrew as counsel for the client when he apparently became aware that he would have to present his ‘instructing attorney’ to the magistrate on 18 April 2012; and (d) failed to fulfil his mandate for which he had received a substantial payment.

The magistrate’s notes reflect that at proceedings on 20 April 2011 the respondent informed the court that he was appearing on behalf of the client concerned (who was the second accused) ‘in opdrag R Petersen’. He thereafter appeared on behalf of the client on nine occasions up to and including 18 April 2012, when he withdrew as his legal representative at a time when the matter was part heard. The second complainant stated that by that stage she had paid the respondent (on each occasion, in advance) a total sum of R9 000.

The complainant also stated that on the previous day, i.e. 17 April 2012, the respondent had failed to appear despite this having been a scheduled court date and the respondent having previously informed the presiding magistrate of his availability. The second complainant had then approached the attorney who was representing the other accused to enquire whether he would be prepared to stand in due to the unexplained absence of the respondent. The attorney concerned indicated that he would first have to obtain the permission of the presiding magistrate. After he returned from discussing the matter with the magistrate he informed the complainant that ‘iets nie plus is nie’.

The complainant was informed that the magistrate was not prepared to have the other attorney stand in for the respondent. She was called into the magistrate’s office and was asked whether she knew attorney Petersen. She replied that she did not know such a person and had never had any professional dealings with him. She confirmed that she had always only dealt with the respondent. The magistrate directed the second complainant to convey to the respondent that when he again appeared he was to have Mr Petersen accompany him. The second complainant did not herself convey the magistrate’s instruction to the respondent since she was frightened that he would then not appear on the following day. The respondent did appear on the following day but immediately withdrew as counsel for the second accused. The second complainant states that ‘hy was kwaad vir my en het aangedui dat hy uit die saak bedank. Geen Mnr Peters [sic] was by die hofverrigtinge teenwoordig nie’.

The client concerned had been charged with serious offences, namely attempted murder, robbery with aggravating circumstances and unlawful possession of ammunition. The second complainant was clearly a person of limited means, a widow whose husband had passed away over 22 years previously and who had raised her children on her own.

In his answering affidavit the respondent claimed that he had indeed been instructed by Mr Petersen and that ‘it is because of my compassion of people [sic] and the need to help the poor ... [that] I convinced Mr Petersen to allow me to do the matter for R8 000’. He denied having withdrawn from the proceedings of his own accord, alleging that the attorney who had appeared on behalf of the

co-accused had notified him on 18 April 2012 that he had instead been requested by the second complainant to continue to represent the client. The respondent also denied having received payment of an amount of 'R8 000' from the second complainant. He has not disclosed how much he was paid for his services.

As previously mentioned, annexed to the applicant's replying affidavit are affidavits by both Mr Petersen and Mr Kubukeli. Both stated on oath that at no stage was the respondent briefed by them in either of the matters giving rise to the complaints; and further that neither had ever taken instructions from either of the complainants or the clients who the respondent represented. The applicant invited the respondent to answer these allegations prior to the hearing. His supplementary affidavit was filed after the matter was postponed on 7 June 2013. I have already dealt with his response to the first complaint. In regard to Mr Petersen's 'instruction' in relation to the second complaint, the respondent again effectively admitted that he had previously lied under oath to this

court. He stated that he had 'given Mr Petersen an instruction fee and he has never given me a receipt or a written instruction'.

During argument the respondent was asked to clarify what he meant by 'an instruction fee'. His evidence was that it was his *modus operandi* to secure a client; take money directly from the client; and then pay Mr Petersen a portion of the monies received in order for the latter to pretend to instruct him while he (i.e. the respondent) pocketed the balance. He was blatant that the purpose of this arrangement was to side step the referral rule; that in the case of both of the present complaints Mr Petersen had

never even met either of the complainants (or the clients that the respondent represented); and that Mr Petersen's

involvement extended only to taking a fee so that the respondent could misrepresent that he was instructed by an attorney.

Even more startling is that the respondent clearly does not comprehend that his behaviour constitutes a shocking disregard of his professional duties; and that, irrespective of his own personal views about the referral rule, he is bound to adhere thereto unless the decision in the *De Freitas* case is set aside. The respondent is obviously at liberty to pursue his attack on the constitutionality of the referral rule but this does not mean that in the meantime he is entitled to deliberately flout it. In addition s 9(2) of the Act makes it an offence for an advocate to share any portion of his professional fees with any person other than another advocate. The

extent of the respondent's utter lack of appreciation of his professional obligations is illustrated by the vocal displeasure

that he displayed at Mr Petersen apparently having refused to depose to an affidavit confirming the alleged arrangement between them; and he went so far as to brand Mr Petersen (who was not afforded the opportunity to respond to the allegations made against him) 'a liar and a thief'. Certainly, if the allegations made against Mr Petersen have merit it would be appropriate for the

Law Society to investigate them; but Mr Petersen's conduct is not something that we have to determine in this application; nor does it – even if true – have any bearing on the respondent's own conduct.

It is settled law that in deciding whether an advocate or attorney should be struck from the roll the court conducts the following three-stage enquiry, namely: (a) whether the impugned conduct has been established on a balance of probabilities – this is a factual enquiry; (b) whether the individual is fit and proper to continue to practice – although this involves the exercise of a judicial discretion and the words 'in the discretion of the Court' as they appear in s 22 of the Attorneys Act 53 of 1979 are absent from the Act, the enquiry in each case necessarily calls for the conduct complained of to be weighed against the standards of the profession, which is partly value judgment and partly objective fact; and (c) whether the individual should be removed from the roll or suspended: see *inter alia* General Council of the Bar of South Africa v Geach and Others 2013 (2) SA 52 at paragraphs [50] and [51].

The most serious misconduct complained of, namely dishonesty, perjury and lying to a magistrate, has been admitted by the respondent. In addition, on his own version, the respondent has deliberately taken steps to circumvent the referral rule and is guilty of an offence in terms of s 9(2) of the Act.

In the Geach case the Supreme Court of Appeal had the following to say at paragraph

[126] about the meaning of the term 'fit and proper person' to be admitted to practice:

'A person can only be admitted to practice as an advocate if they satisfy the court that they are a fit and proper person to be admitted as such. Central to the determination of that question, which is the same question that has to be answered in respect of attorneys, is whether the applicant for admission is a person of "complete honesty, reliability and integrity". The court's duty is to satisfy itself that the applicant is a proper person to be allowed to practice and that admitting the applicant to the profession involves "no danger to the public and no danger to the good name of the profession".'

It follows that the same requirement applies throughout the period in which the individual concerned in fact practices, i.e. that he or she remains a person of complete honesty, reliability and integrity and that by continuing to practice he or she will not be a danger to the public and to the good name of the profession.

There can be no doubt that the respondent's actions in lying under oath, misleading one court and attempting to mislead another, constitute professional misconduct of the most serious nature. There is also no doubt that this conduct has brought the profession into disrepute. The only conclusion to be drawn is that the respondent indeed lacks the necessary 'qualities of honesty and integrity [that] must continue to be displayed throughout an advocate's practice... Conduct by an advocate in the course of his or her

practice that demonstrates a lack of honesty or integrity has repeatedly been held to lead to the conclusion that they are no

longer a fit and proper person to continue to practice as an advocate': see Geach (supra) at paragraph

[127] and the authorities cited at footnote 44.

In *Van der Berg v General Council of the Bar of South Africa* [2007] 2 All SA 499 (SCA) at paragraph [50] the court held that a period of suspension from practice will be regarded as sufficient if it will correct the behaviour complained of and serve to prevent a recurrence thereof. The paramount consideration of the court in exercising its discretion as to whether to suspend or strike off a practitioner is the protection of the public. The duty to protect the interests of the public has led our courts to conclude on numerous occasions that only exceptional circumstances will prevent the striking-off of a practitioner when he or she has been found to be dishonest: Geach (supra) at paragraph [87].

The respondent is not subject to the disciplinary oversight of the applicant since he is not a member of the applicant. He is thus at liberty to continue to practice without professional oversight in circumstances in which, viewed objectively, it is probable that he will repeat his conduct and thereby again bring the profession into disrepute and imperil the legal rights of his clients. The respondent was able for an extended period to hoodwink an officer of the court (i.e. the magistrate); the chances are that he will be just as successful when it comes to unsuspecting members of the public. Of particular concern is that the respondent has not only lied under oath, misled one court and attempted to mislead another, but he considers that there is nothing wrong with his deliberate flouting of the referral rule and his breach of s 9(2) of the Act. He also disavows all responsibility for the predicament in which his clients ultimately found themselves, choosing rather to place the blame elsewhere. Members of the public must be protected from persons who practice as advocates in this manner and must be able to assume that advocates have the necessary qualities of complete honesty, reliability and integrity. A court, having admitted a person as an advocate in the first instance, exercises its inherent right to control and discipline the practitioners within its jurisdiction. In so doing,

it acts under a public duty, in the interests of the court, the profession and the public at large: see *Society of Advocates of South Africa (Witwatersrand Division) v Edeling* 1998 (2) SA 852 (WLD) at 860B-F.

The respondent has failed to place any evidence of 'exceptional circumstances' before this court as to why he should be suspended rather than struck from the roll. Although it is unfortunate that he has

dependants, this factor alone cannot outweigh his reprehensible conduct and militate against him being struck from the roll rather

than merely suspended. In addition, and having regard to his stated attitude as outlined above, the probabilities are that a suspension from practice will not have the desired effect, i.e. to prevent a recurrence of his conduct. The respondent has made no attempt whatsoever to accept any responsibility. He has defiantly displayed disregard for core ethics and a disturbing lack of concern for his clients who are members of the public.

It follows that the only appropriate order that this court should make is one striking the respondent from the roll of advocates. Of course it is open to the respondent to make application for his re-admission in the future, if he is able to satisfy the court that he is a fit and proper person to be re-admitted to practice as an advocate.

The applicant asks for costs on the attorney and client scale, which is the usual order made in matters of this nature. I see no reason to make any other order.

[27] In the result the following order is made:

1. The respondent's name is struck from the roll of advocates of this Court.
2. The respondent shall pay the costs of this application on the scale as between attorney and client, including the wasted costs of the postponement on 7 June 2013 and the respondent's abortive application to strike out portions of the applicant's replying affidavit.

J I CLOETE

YEKISO J:

I agree.

N J YEKISO

Counsel for the applicant:

Adv Anton Katz SC and Adv Wynand Jonker

Attorneys for the applicant:

Bisset Boehmker McBlain

Respondent appeared in person

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Prepared on 10 October 2026 · Esheria