

SOUTH AFRICA / JUDGMENT

Claassen and Another v The Free State Law Society and Others (5940/2017)

[2018] ZAFSHC 148 (12 April 2018)

[2018] ZAFSHC 148**COURT**

Free State High Court, Bloemfontein

BEFORE

P J Loubser

CASE / FILE NUMBER

5940/2017

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****FREE****STATE DIVISION, BLOEMFONTEIN****Case****No: 5940/2017****In****the matter between:****A C CLAASSEN**

First

Applicant

JOLUZA**BOERDERY (PTY) LTD**

Second

Applicant

and

THE FREE STATE LAW**SOCIETY**

First Respondent

F J SENEKAL

Second

Respondent

MATSEPES**INCORPORATED**

Third

Respondent

HEARD**ON:****15 MARCH 2018**

JUDGMENT

BY: LOUBSER, J

DELIVERED ON: 12 APRIL 2018

JUDGMENT

[I]

INTRODUCTION:

- [1] This is an application, filed on an urgent basis, wherein the Applicants seek the following relief:
- (a) That the First Respondent is ordered to launch an application within seven (7) days of this order to suspend the Second Respondent from practising as an attorney of this Court, and to take control of the trust account of the Third Respondent.
 - (b) That the First Respondent be ordered to pay the costs of the application on an attorney and client scale.
- [2] The application came before the Court on 17 November 2017, on which date the matter was postponed by agreement between the parties to 14 December 2017 for hearing. The costs of the postponement were reserved. On 14 December 2017, the matter was again postponed to 15th March 2018, with the costs reserved again. In this judgment I will refer to the First Respondent as “the Society”, to the Second Respondent as “Senekal” and to the Third Respondent as “Matsepes”. The First Applicant is the sole director and shareholder of the Second Applicant Company. All three the Respondents oppose the application.

[II] THE CASE FOR THE APPLICANTS:

- [3] The Applicants contend in their founding papers and through submissions made by their counsel that Senekal is no longer a fit and proper person to be practising as an attorney, and that the Society is failing to take any steps against him although the Society is well-informed of this state of affairs. The conduct of Senekal complained of, consists in allegations of, inter alia, irregularities including a deficit, found in the trust account of Senekal and Matsepes during the execution of an Anton Piller order on 5 October 2017, of fraudulent and dishonest conduct, of purgery, of practising as an attorney for a period of time without a Fidelity Fund Certificate, and of the misappropriation of estate funds.
- [4] As for the Society, the Applicants allege that the Society is dismally failing to protect the public against Senekal. They point out that the Society has already resolved to proceed with a striking application against Senekal on 18 May 2017, but that it had reconsidered that decision on 23 June 2017 in order to afford Senekal an opportunity to appear before the council to advance reasons as to why the striking application should not be proceeded with.

There is no indication whether Senekal had indeed appeared before the council since, and what the outcome thereof was, it is alleged.

- [5] It is further alleged that, more recently, the Anton Piller proceedings revealed further irregularities which provided the Society with irrefutable proof of Senekal's misconduct, but notwithstanding, the Society fails to take immediate action against Senekal to protect the Applicants and the public in general against further damage.

[III] THE CASE FOR THE SOCIETY:

- [6] The Society contends that the application should be dismissed for want of any urgency. It further states that it has received the complaints from the Applicants on 19 October 2017, and that its investigations surrounding those complaints have so far revealed many new facts which should be considered by the Society. It is further alleged that the investigations are not complete as yet, and that it should be allowed to take its course without prejudice to the role-players concerned. It also alleges that some of the information provided by the Applicants are inaccurate, and that there is a lack of evidence regarding the allocation of certain amounts and payments to certain individuals.
- [7] It is further pointed out by the Society in the opposing papers that it does not institute any action or civil suit against a member, but that it merely submits to the Court facts which it contends constitute unprofessional conduct, and then leaves it to the Court to determine how it will deal with the attorney concerned. During

this process, a practitioner should be appraised of the complaint(s) and afforded the opportunity of answering thereto before such a drastic step is taken of bringing him before the Court on allegations of unprofessional conduct. Also, during this process, the complaints first have to be investigated in terms of a specific procedure to be followed by the Society. This procedure can become lengthy and cumbersome in view of the attorney's rights, for instance the right to be heard.

- [8] At the hearing of the application, the Court was informed by Mr Grewar, acting for the Society, that Senekal will be required to plead to specific charges before the Society in the near future.

[IV] CASE FOR SENEKAL:

- [9] Senekal filed an Opposing Affidavit comprising of some eighty (80) pages in answer to the allegations in the Founding Affidavit. He is also of the opinion that the application was never urgent, and that it should be dismissed with costs on a punitive scale. In this affidavit, he denies all the allegations levelled against him, and he provides explanations for the different acts or omissions of unprofessional conduct he is accused of.

[V]

DETERMINATION:

- [10] On the face of it, the allegations against Senekal are of a very serious nature. In addressing the Court, Mr Janse van Rensburg, appearing for the Applicants, highlighted the fact that Senekal had been practising as an attorney for some six (6) months without a Fidelity Fund certificate, and that a deficit of some R48,000.00 has been found in his trust account. The Society, however, mentions in its opposing affidavit that an even larger deficit was found which is currently under investigation. Senekal points out in his Opposing papers that the alleged shortfall of R48,000.00 does not reflect a trust shortfall at all, but a shortfall in a certain bond premium.
- [11] No reference is made in the Founding Affidavit to the issue of the Fidelity Fund certificate. This issue only surfaced in the Replying Affidavit filed by the Applicants, where it is stated that there is reason to believe that Senekal is not in possession of such a certificate for 2018, due to some confusion as to the true identity of Matsepes, which confusion has already been reported to the Society during November 2017.
- [12] As pointed out earlier, there are many more complaints against Senekal than the two discussed above. According to the Society, these complaints are in the process of being investigated. In terms of Section 22(1) of the Attorneys Act no. 53 of 1979, an attorney may on application by a Law Society be struck off the roll or suspended from practice by the Court. When a Law Society brings such an application, it does so *custos morum*, as the guardian of morals of the Attorney's profession. It merely places facts for consideration by the Court in the exercise of its disciplinary function over attorneys as officers of the Court so as to enable it to exercise its discretion as to the appropriateness of a sanction to be imposed in the event that the commission of the transgressions is established.
- (SEE: LAW SOCIETY OF THE FREE STATE v WERNER LE ROUX & OTHERS (UNREPORTED) CASE NUMBER 3039/2014, per MOLEMELA JP at para [11] and HASSIM v INCORPORATED LAW SOCIETY OF NATAL 1977
- (2) SA 757 (A) at 767 C – G)
- [13] In BOTHA v LAW SOCIETY OF THE NORTHERN PROVINCES 2009
- (3) SA 329 (SCA) the Supreme Court of Appeal reiterated that Section 22 contemplates a three-stage inquiry by the Court, namely, the Court must firstly decide whether the alleged conduct has been established on a preponderance of probabilities, and secondly, the Court must decide whether the person concerned is a fit and proper person to continue to practise as an attorney. Thirdly, the Court must decide whether, in all the circumstances, the attorney is to be removed from the roll or whether an order of suspension would suffice.
- [14] It therefore stands to reason that a Law Society has to investigate all complaints against an attorney comprehensively and diligently, and to hear him in disciplinary proceedings, in order for it to decide whether an application for striking or suspension is appropriate in the circumstances, and in order to place sufficient facts before the Court for consideration when

such an application is eventually brought. In my view, a Law Society should be allowed to take such steps without interference and without undue pressure. In the absence of any clear indication that the Society is presently neglecting its duties in this regard, I am not inclined to deviate from this view.

- [15] In any event, the relief sought does not make any practical sense. This application is not for the suspension or striking of an attorney, but for an order compelling the Society to make application to this Court within seven (7) days for an order suspending Senekal from practising as an attorney and from taking control of the trust account of Matsepes. If such an order is granted, nothing would prevent the Society, for instance, to mention in its application papers that they are only filing the application because they were compelled to do so by the Court, and that they are not quite ready to place sufficient facts before the Court to warrant suspension, due to the fact that the investigations are not yet complete.
- [16] The application as it stands can therefore not succeed. It has been brought prematurely and without proper consideration to the practical effectiveness of the relief sought. It is therefore not necessary to consider the issue of urgency in the application.
- [17] The question of costs remains to be decided. As the successful party herein, the Society is entitled to its costs on an attorney and client scale. In view of the findings of the Court, it was not, strictly speaking, necessary for Senekal and Matsepes to file an opposing affidavit to the extent that they did. They are therefore not entitled to their costs.
- [18] The following order is therefore made:
1. The application is dismissed with costs for the First Respondent on an attorney and client scale, which costs include the costs incurred in the postponement on 17 November 2017 and 14 December 2017.
 2. No order as to costs is made in relation to the Second and Third Respondents.

P J LOUBSER, J

On behalf of the Applicants: Advocate F G Janse van Rensburg

Instructed by: Willers Attorneys, Bloemfontein

On behalf of First Respondent: Advocate D M Grewar

Instructed by: Azar & Havenga Incorporated, Bloemfontein

On behalf of Second and Third Respondents: Advocate J J F Hefer

Instructed by: Matsepes Incorporated, Bloemfontein

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