

SOUTH AFRICA / JUDGMENT

KwaZulu - Natal Law Society v Moodley and Another (7037/2014) [2016] ZAKZPHC 25 (26 February 2016)

[2016] ZAKZPHC 25

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

D. Pillay, Van Zyl

CASE / FILE NUMBER

7037/2014

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IN THE HIGH COURT OF
SOUTH AFRICA
KWAZULU-NATAL DIVISION,
PIETERMARITZBURG
CASE NO: 7037/2014
DATE: 26 FEBRUARY 2016

In the matter between:

KWAZULU-NATAL LAW
SOCIETY.....APPLICANT
And
SUBASHNIE
MOODLEY.....FIRST
RESPONDENT
ABSA
BANK.....SECOND
RESPONDENT
Date of hearing: 10-11 February 2016
Date of judgment: 26 February 2016
D. Pillay J (Van Zyl J Concurring)
ORDER
[1] a. The name of the first respondent
be struck from the roll of attorneys of this court, and
b. an order is made in terms of the
provision of prayer 1.1 to 1.12, both inclusive, as well as prayers 5
and 6 of the notice of
motion dated 16 May 2014.

JUDGMENT

- [1] The applicant seeks to strike off the first respondent from the roll of attorneys on account of her not being a fit and proper person to practise as an attorney. On the first day of a three-day trial the first respondent conceded three of the four counts of professional misconduct against her. The applicant called two witnesses to prove the only count that the second respondent denied. The first respondent closed her case without testifying.
- [2] In this application for striking off in terms of s 22(1)(d) I adopt the three-staged enquiry outlined in *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) para 10 and followed in *Malan and another v Law Society, Northern Provinces* 2009(1) SA 216 SCA para 4-6:
- a. Has the applicant established the first respondent's offending conduct as a fact?
 - b. Is the first respondent a fit and proper person to remain in practice having regard to the conduct expected of an attorney?
 - c. In all the circumstances should the first respondent be removed from the roll of attorneys or be suspended from practice?
- [3] The applicant received a complainant from Ms Vijayluxmi Gengan that the first respondent was handling a Road Accident Fund (RAF) matter for Mr Theodore Charles Minnie who had granted Ms Gengan a special power of attorney to represent him. His accident had left him physically disabled without his right leg. Mr Minnie also had a child of sixteen years with Ms Gengan.
- [4] Ms Gengan and the first respondent were friends having met at their temple in Chatsworth. Ms Gengan was dissatisfied with the services her ex-husband Mr Minnie received from his erstwhile attorney who was attending to the claim and instructed the first respondent to take over the file. She and Mr Minnie met the first respondent at Checkers in the Bluff south of Durban. The first

respondent requested Mr Minnie to sign documents pertaining to the claim. She confirms that it was on this occasion that she also

secured a special power of attorney and a contingency fee agreement in terms of the Contingency Fees Act No. 66 of 1997 from Mr Minnie.

- [5] Ms Gengan sent several short message services (smses) to the first respondent's cellular phone during 2013. She received the following response from the first respondent:

'The Minnie file has not been settled as soon as it is settled I will contact you until then I do not want to see you, hear you or smell you.'

- [6] The first respondent has no recollection of sending this sms response but acknowledges that she might have done so because Ms Gengan's conduct had become increasingly unreasonable. She constantly contacted the first respondent's offices and was aggressive when enquiring about progress.
- [7] Ms Gengan reminded the first respondent that the RAF had settled the claim in February 2013 and that they had paid an amount of R560 000.00 to the first respondent. Frustrated at not receiving any response from the first respondent who had also moved offices by then Ms Gengan approached attorneys Arvin Singh and thereafter the applicant for assistance with proof that the RAF had paid the claim into the first respondent's trust account on 15 February 2013.
- [8] Two inspectors testified that on receipt by the applicant of a complaint against the first respondent the applicant resolved to issue a notice in terms of s 70 of the Attorneys Act 53 of 1979 informing her that it intended to inspect her books, documents and records as a prelude to deciding whether to enquire into her conduct in terms of s 71 of the Act. The notice required her to meet with the inspectors to provide records of her trust account investments in terms of s 78(2) or s 78(2A), interest and records of deceased or insolvent estates or estates under curatorship in which she was an executor or curator. She was also required to produce various accounting and other records to the inspectors. This notice was despatched about 20 August 2013.
- [9] The inspectors met the first respondent only on 10 March 2014. The extraordinary delay of more than six months occurred as a result of the first respondent avoiding the meeting with the inspectors.
- [10] The documents that the inspection committee requested from the first respondent included a purported contingency fees agreement, a paid cheque for R5 000.00 in favour of S Ramnarain, an extract from the first respondent's trust account for February to March 2013, an affidavit from Mr Minnie revoking his special power of attorney to Ms Gengan, terminating his mandate to Arvin Singh attorneys and confirming his mandate to the first respondent to act on his behalf, and an acknowledgment of debt signed by the first respondent in favour of Mr Minnie for R420 000.00 plus interest at 7% per annum. In the meantime Mr Minnie had died on 7 October 2013.
- [11] At the meeting with the inspectors on 10 March 2014 the first respondent produced a manuscript ledger page for Mr Minnie. Arising from this ledger page the inspectors identified three items that they required the first respondent to produce. These were: the file of Estate Late Sadhanandan Naidoo, support documents for the payment of R5 000.00 to Advocate Roberts and proof that an amount of R375 000.00 disbursed out of Mr Minnie's account had been invested in an interest bearing trust account for his benefit. The first respondent undertook to deliver these items to the office of one of the inspectors, which was nearby her own office within a week.

- [12] The applicant alleged that notwithstanding the lapse of more than a month the first respondent failed to produce the documents before this application was launched on 21 May 2014. Hence her failure to produce the documents requested by the inspectors in terms of s 70 constituted count 1, the only disputed count.
- [13] The applicant's inspectors ascertained from the first respondent the following: Using the power of attorney that Mr Minnie had given her to accept the offer from the RAF she received the RAF payment into her trust account on 20 February 2013. She went to see Mr Minnie after she received the funds to discuss the offer and her proposal that he lend her the sum of R420 000.00. She was unable to find Mr Minnie at his usual place at Checkers. He had no known relatives. When she met Mr Minnie again he agreed to lend her the total proceeds of his claim and was 'adamant' that he did not want legal advice about lending her his money. She prepared the acknowledgment of debt for Mr Minnie's signature. For the first time Mr Minnie attended at her offices on his own at 23 September 2013 and dropped off an affidavit, which she insisted she did not prepare.
- [14] The first respondent disputed the power of attorney Mr Minnie had given to Ms Gengan. The inspectors formed the view that her affidavit was an attempt to absolve her of any wrong doing; that the affidavit and acknowledgement of debt are framed in the language and format typically used by legal practitioners.
- [15] The first respondent initially stated that she had repaid the loan with interest. After further questioning she advised the inspectors that she had paid the loan into her trust account. The inspectors advised her then to place Mr Minnie's funds in a separate interest bearing account pending appointment of an executor to wind up Mr Minnie's estate. Production of proof of that investment in terms of s 70 formed the basis of the charges in count one.
- [16] The four counts were:
- a. A contravention of s 70(2) of the Attorneys Act No. 53 of 1979 by the first respondent failing to produce documents as requested by the inspectors.
 - b. A contravention of KwaZulu-Natal Law Society rule 14(b)(xx) in that the first respondent borrowed money from her client, Mr Minnie without him being independently represented in the transaction.
 - c. A contravention of KwaZulu-Natal Law Society rule 20 in that the first respondent paid business debts from her trust bank account.
 - d. The contingency fee agreement signed by Mr Minnie did not comply with the requirements of the Contingency Fees Act No. 66 of 1997.

- [17] In her defence the first respondent pointed to a letter dated 14 March 2014 from ABSA Bank, the second respondent confirming a deposit of R450 544.00 into the account of the first respondent in trust for T.C Minnie. She maintained that she submitted that letter to the applicant before it launched this application. She also submitted a report from her accountant to explain that the payment to Advocate Roberts was against an invoice from him for R10 000.00. She persisted that no file existed for Estate Late S Naidoo.
- [18] The applicant denied receiving the requested documents any time before the application was launched. The first respondent produced no proof of delivery of the documents any time before the application was launched, nor details of when, where and to whom delivery was made.
- [19] The applicant's inspectors did not record in writing to the first respondent what documents she was required to produce and the date by which she was to do so. The explanation was that as a member of the profession it was unnecessary to do so because the documents had been identified in discussion at the meeting.
- [20] Serious disciplinary consequences flow from non-compliance by a practitioner with a request for information in terms of s 70. As an indication of the degree of importance of a notice to inspect in term of s 70 the applicant issues such notices in writing. Inspectors should also record their requests in writing precisely to avoid the waste of time and expense of having to testify to prove such an elementary administrative fact. Equally, responses to such official notices should also be recorded in writing. Proof of delivery and receipt of such notices and replies should be easily ascertainable from the mere production of documentation without the need to lead oral evidence.
- [21] In this instance because the first respondent declined to testify I find that the applicant requested the documents that the first respondent failed to deliver before the application was instituted. This amounts to contravention of s 70(2) of the Act. Accordingly the first respondent is guilty of contravening s 70(2) of the Act.
- [22] The first respondent's admission that she contravened the provisions of rule 14(b)(xx) of the applicant's rules is accompanied by her explanation as follows:
- [23] Mr Minnie, a sometime car guard and beggar, was fearful of Vijayluxmi Gengan also known as Rebecca. He was concerned that she wanted the proceeds of his claim against the RAF. He also did not want to squander the money as another beggar had done. Hence he wanted the first respondent to keep the money for him until he decided what to do with it. The first respondent suggested that he should lend the money to her for a year and she would repay it with interest. He agreed. The first respondent advised him that he should get independent legal advice before lending the money to her but he 'flatly refused'. The first respondent respected his views. With the benefit of hindsight she regrets doing so. She undertakes not to repeat this contravention.

- [24] The first respondent's explanation for contravening the third count is as follows: With the benefit of hindsight the first respondent acknowledges that she ought first to have transferred the capital of the loan from Mr Minnie into her business account and not disbursed it from her trust account. She has since realised that she has to keep her business and trust accounts separate and not to pay any business debts from her trust account. She has received her Rule 21(A) certificates consistently since this transgression.
- [25] Her explanation for count four is as follows: She concedes that the contingency fees agreement that Mr Minnie signed did not comply with the Contingency Fee Act. She regrets not being more careful in insuring that the agreement complied with this Act. She consents to repaying the estate of the late Mr Minnie the amount she received in terms of the agreement in excess of her taxed fees. She undertakes to study the applicant's December 2015 circular and its guidelines published on its website since 21 May 2014. She also withdraws her claim as sole beneficiary in the purported will of the late Mr Minnie.
- [26] In view of my finding on count one and the first respondent's admissions in respect of the remaining three counts the applicant has discharged its onus of proving on a balance of probabilities that the first respondent has committed professional misconduct as alleged. In turning to consider whether the first respondent is a fit and proper person to remain in practice I consider her explanations on affidavit for contravening counts two to four which must be weighed against the following case the applicant makes against her:
- [27] The first respondent is an attorney enrolled to practice as such on 18 June 2004. When she committed the contraventions above she had been in practice for about ten years. She was an experienced attorney who should have known the rules and the consequences of contravening them.
- [28] The nature of the contraventions is such that the first respondent cannot and does not plead ignorance of the law. Such a plea is quite unsustainable considering that firstly the curriculum for legal practise training for attorneys includes accounting practice. In this course much emphasis is placed on differentiating between an attorney's trust account and business account. Candidate attorneys are taught that attorneys cannot treat their trust account as their personal accounts. Therefore business and personal accounts cannot be paid out of the trust account. Prior to receiving settlement of Mr Minnie's claim the first respondent did not have sufficient funds in her trust account to repay her loan obligation to Estate Late Naidoo.
- [29] The first respondent's chartered accountant appointed to audit the queried payments from her trust account confirmed that she paid her business debts from the monies she held for Mr Minnie in her trust account. He obtained affidavits from the various persons to whom she had made such payments to confirm that they had received them. Three payments including the one to Estate Late Naidoo were repayments of loans advanced to the first respondent.

- [30] On receipt of the RAF settlement of R560 000.00 she immediately appropriated the sum of R140 000.00 being 25% of the settlement as per her alleged contingency fee agreement with Mr Minnie. In addition the first respondent had rendered a bill of costs for R24 281.94 excluding disbursements of R28 000.00 in Mr Minnie's matter.
- [31] The contingency fee agreement manifestly fails to comply with the Contingency Fees Act. It is incomplete, undated and unsigned by the first respondent. The applicant also questioned Mr Minnie's signature to the purported agreement because it appears to be different from his signature to his affidavit; it is also not witnessed or commissioned.
- [32] What makes the first respondent's conduct particularly egregious is that Mr Minnie was on her own version a beggar and a person with disabilities. Furthermore he had a minor dependant. They were vulnerable persons at her mercy.
- [33] In reply damning affidavits were delivered on behalf of the applicant. In the first Ms Gengan responded to the first respondent's claim that Mr Minnie had instructed her to draw his will and instate herself as his sole beneficiary. Ms Gengan drew attention to two wills that were lodged with the Master following Mr Minnie's death. The first was dated 3 July 2013 in favour of their child Dinalee Minnie. The second dated 25 September 2013 nominated the first respondent as the sole beneficiary and P Odayar and Associates an attorney with whom the first respondent shared offices as the executor. The will In favour of the first respondent was lodged on 12 February 2014. Faced with two wills the Master made no appointment of an executor. The first respondent used this as an excuse for not paying the funds due to the Master as the guardian of the minor child who is in the meantime severely prejudiced.
- [34] Significantly the will in favour of his daughter is signed with both a thumbprint and a signature and commissioned by an attorney. The signature appearing on this will is manifestly different from his signature to the will in favour of the first respondent, the acknowledgement of debt and the contingency fee agreement. However it falls beyond the expertise of the court to reach any conclusion as to whether the signatures appearing on the documents produced by the first respondent are the signatures of Mr Minnie.
- [35] Ms Gengan insisted that all communications with the first respondent about Mr Minnie's claim was through her; she had arranged to take him to specialists. She and her daughter had a good relationship with Mr Minnie.
- [36] She complained bitterly about the first respondent's failure to pay Mr Minnie and his daughter any interest monthly for their survival. She disputed that Mr Minnie was educated and literate to the extent that he would understand the contents of the acknowledgement of debt. Contrary to the first respondent's evidence that he had matriculated he had achieved no higher than standard two. As a result of their dire financial circumstances the child was forced to leave school.

- [37] Ms Gengan was constantly in touch with Mr Minnie. However on 26 September 2013 she lodged a missing persons complainant with the South African Police Services at Brighton beach police station under Malvern CAS 45/10/2013. On 8 October 2013 the Bayview Police informed her that the first respondent had given them her address and requested her to identify the deceased Mr Minnie. She did. He was wearing the same clothes in which she had seen him on the last occasion. Attorney Arvin Singh and a private investigator Seelan Pillay arranged Mr Minnie's funeral and church service.
- [38] In the second affidavit Mr Arvin Singh attests to receiving Ms Gengan and Mr Minnie in his offices on 21 August 2013. After explaining and ensuring that Mr Minnie understood the nature and contents of his mandate instructing Mr Singh. Mr Minnie signed the mandate in favour of Mr Singh. Taking precautions Mr Singh attached a photograph of Mr Minnie to the mandate. He forwarded the mandate to the first respondent.
- [39] Mr Singh narrated the correspondence exchanged with the first respondent complaining in his letters of 30 July and 12 August that she had failed to afford him the courtesy of a reply. In his letter of 11 September 2013 he informed the first respondent that he acted for Ms Gengan who had been instructed by Mr Minnie. He demanded a copy of the offer of acceptance and other documents signed by Mr Minnie and the first respondent on his behalf, his original identity book, her trust account receipts in respect of payments she received in respect of his claim and costs from the RAF. He demanded a cheque for the full amount for the payment from the RAF plus interest in favour of Mr Minnie alternatively Ms Gengan.
- [40] On 23 September 2013 Mr Bahadur contacted him. Attorney Bob Bahadur representing the first respondent contacted Mr Singh on behalf of the first respondent. Mr Singh informed him that the first respondent had already been reported to the applicant and the South African Police Services for investigation. Mr Bahadur informed Mr Singh that the first respondent was prepared to pay Ms Gengan and Mr Minnie in instalments and that she had already paid Ms Gengan R200 000.00 Mr Singh called for proof of payment of this amount.
- [41] In a letter of 23 September 2013 Mr Singh informed Mr Bahadur that the first respondent was behaving 'in a sinister and perturbing manner' and that he refused to believe that Mr Minnie had genuinely cancelled his mandate to him until Mr Minnie confirmed this personally.
- [42] When he received the letter of 25 September 2013 from the first respondent enclosing the affidavit purportedly by Mr Minnie he ascertained that the commissioner of oaths in that affidavit, a certain 'Govender', a detective from Isipingo was the first respondent's cousin. He obtained an affidavit from Colonel Sandhya Singh. She had also informed Mr Singh that she had obtained the affidavit from Mr Minnie on 7 October 2013.
- [43] Colonel Sandhya Singh attached to the Durban Commercial Crimes Unit within the priority crimes directorate attested in an affidavit that on 4 October 2013 she confronted the first respondent with the allegations by Ms Gengan against her. She informed the Colonel that Mr

Minnie had revoked Ms Gengan's power of attorney; that she could no longer represent him; that she had distributed all monies paid into her trust account in accordance with Mr Minnie's instructions and that she could account for his money. She informed the Colonel that she was unable to produce Mr Minnie to the Colonel as he did not have a fixed abode.

- [44] On 7 October 2013 she produced an affidavit purportedly signed by Mr Minnie that morning revoking Ms Gengan's power of attorney. The Colonel insisted on seeing Mr Minnie personally. The Colonel advised her to bring Mr Minnie to her when next he contacted her. The Colonel observed that the first respondent was uneasy and nervous during this meeting. After she left the Colonel noticed that contrary to the first respondent's advice the affidavit was dated 25 September 2013 and not 7 October 2013.
- [45] On 8 October 2013 Mr Singh advised the Colonel that Mr Minnie was found burnt to death. The Colonel reported the first respondent to the law society and the Fidelity Fund. About a week later she learnt from a policewoman that Mr Minnie's death was being investigated.
- [46] On 6 November 2013 the first respondent deposed to an affidavit confirming that Mr Minnie was homeless and that he was accommodated at 23 Vera Road Malvern. Minnie had burnt to death at that address.
- [47] In her supplementary answering affidavit the first respondent denied that she had instructed Mr Bahadur to represent her. Nor did she instruct him that she had already paid the amount of R200 000 to the complainant. She conceded that the commissioner of oaths of Mr Minnie's affidavit of 25 September 2013 was her relative but a distant one. She contended that her reference to the will in her answering affidavit at paragraph 24 was not to Mr Minnie's but to Ms Gengan's former partner Mr Prithraj. She denied preparing Mr Minnie's will (page 226 of the record). This is patently false because in paragraph 24 she stated that she 'asked the deceased in the presence of the complainant when [she] took instructions to prepare his will' about any immovable property.
- [48] She attached a copy of Mr Minnie's death certificate dated 7 October 2013. The first respondent denied that the child suffered any prejudice. She suggested that Ms Gengan might be implicated in Mr Minnie's death. A letter from the Specialised Crime Unit dated 11 March 2015 states that the first respondent is a suspect in the criminal case under investigation and that outstanding documents awaited included documents from the RAF and bank statements.
- [49] How Mr Minnie demised is not a matter from which this court is able to draw any adverse inference against the first respondent. However the fact that she declined to enter the witness box and submit to cross-examination detracts from the credibility of her version.

[50] The four counts on which the first respondent has been found guilty are serious enough to justify her striking off. Not only is her competence to practice in issue but also her honesty and integrity. The further affidavit she obtained from Mr Minnie on the day he burnt to death raises many more questions especially as in that affidavit Mr Minnie purports to 'withdraw all charges' against the first respondent. Yet she has admitted to her professional misconduct in these proceedings. Most damning is her perjury relating to her drafting of Mr Minnie's will in which she was the beneficiary. Seemingly she was also unaware

of s 4A of the Wills Act 7 of 1953 that the preparer of a will cannot also be a beneficiary.

[51] In all the circumstances I am of the view that the first respondent is not a fit and proper person to practice as an attorney of this court. The final question which then arises is the sanction to be imposed upon her.

[52] In my view the conduct of the first respondent, both in taking advantage of a vulnerable client like the late Mr Minnie, as well as in her responses to the complaints and the enquiry by the applicant, as well as in opposing the present proceedings are open to criticism. Such conduct demonstrates a lack of judgment, integrity and insight on the part of the first respondent. But underlying these is also a pervasive character defect.

[53] It follows that the removal of the first respondent from the roll of attorneys is called for. If and when, at some future date, the first respondent is able to persuade the court that these underlying defects in character have been suitably addressed, it might be possible for her to seek readmission as an attorney. But for the foreseeable future it would be quite inadequate in the circumstances to impose upon her a suspension from practice.

[54] In the result the order that I propose is that:

a. the name of the first respondent be struck from the roll of attorneys of this court, and

D. Pillay J

Van Zyl J

APPEARANCES

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