

SOUTH AFRICA / JUDGMENT

Law Society, Northern Provinces v Thirion (71294/2014) [2015] ZAGPPHC 204 (16 April 2015)

[2015] ZAGPPHC 204

COURT

North Gauteng High Court, Pretoria

BEFORE

E M Kubushi, S Potterill

CASE / FILE NUMBER

71294/2014

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IN THE HIGH COURT
OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)
CASE NO: 71294/14
DATE: 16 APRIL
2015
NOT REPORTABLE
NOT OF INTEREST
TO OTHER JUDGES
IN THE MATTER

BETWEEN:

LAW SOCIETY,
NORTHERN
PROVINCES.....APPLICANT
AND
ANNELIE
THIRION.....RESPONDENT

JUDGMENT**KUBUSHI, J**

- [1] This is an application by the Law Society of the Northern Provinces, for an order suspending the respondent, an attorney of the High Court of South Africa, immediately from the roll of attorneys; and for the respondent to immediately surrender and deliver to the registrar of this court her certificate of enrolment as attorney of this court; and for other ancillary orders.
- [2] The applicant is a regulatory authority governing the attorney's profession within the four provinces of Gauteng, Mpumalanga, Limpopo and a portion of the North West Provinces incorporated in terms of s 56 of the Attorneys Act 53 of 1979 (the Act).
- [3] The applicant has locus standi to bring the application.
- [4] The respondent Annelie Thirion, was admitted and enrolled as an attorney of this court on 28 October 2008. Her name is still so enrolled but at the time of the hearing of this application she had already ceased to practice as an attorney. She previously practiced as a sole practitioner under the style Thirion Attorneys.
- [5] The basis of this application is that the respondent is not a fit and proper person to continue to practice.
- [6] The respondent is in essence not persisting with the dismissal of the applicant's claim. She has, however, filed opposing papers which, according to her, are meant to place us in possession of the full facts leading up to the application, specifically her version of events, for a fair and correct decision to be made; and, to request us to grant her a lesser sanction than prayed for in the application.
- [7] Section 22 (1) (d) of the Act provides that a person who has been admitted and enrolled as an attorney may on application of the Law Society be struck off the roll or suspended from practice if he or she, in the discretion of the court, is not a fit and proper person to continue to practice as an attorney.
- [8] Regarding applications of this nature, it is settled law that a court is in effect called upon to consider a three-stage enquiry that requires a court to enquire whether¹
 - (a) The Applicant has established the offending conduct on which it relies, on a balance of probabilities;
 - (b) The conduct established indicates that the attorney is not a fit and proper person to practice; and
 - (c) The attorney should be struck from the roll of attorneys or whether an order suspending the attorney would suffice.

- [9] The first issue to be determined is whether the applicant has established the offending conduct on which it relies, on a balance of probabilities.
- [10] The facts and circumstances which prompted the applicant to launch this application are common cause between the parties. According to the applicant the offending conduct of the respondent is the following:
- (a) the respondent failed to submit her rule 70 auditor's report for the period ending 28 February 2013 to the applicant;
 - (b) the respondent was not in possession of a Fidelity Fund certificate and has practiced as an attorney without such certificate since 1 January 2013;
 - (c) the respondent failed to co-operate with the applicant in an investigation into her bookkeeping and practice affairs;
 - (d) the respondent abandoned her practice alternatively ceased practicing without notifying the applicant, without winding up her practice properly and without filing a closing auditor's report; and
 - (e) the respondent failed to keep the applicant advised of her contact particulars.
- [11] The respondent does not dispute having committed the offending conduct complained of. The explanation which she provides and the reasons she gives as to certain of the transgressions, do not take away the fact that she committed the transgressions.
- [12] For instance, the respondent's averment that she did notify the applicant of the change of her details because her contact details were reported in certain documentation such as her application for a Fidelity Fund certificate and her email signature, does not constitute compliance with rule 3 of the applicant's Rules. As such, her failure to notify the applicant of her changed address as required in terms of rule 3 of the applicant's Rules amounts to unprofessional, dishonorable and unworthy conduct.
- [13] The further averment by the respondent that she did not abandon her practice but ceased practicing as an attorney during September 2013 is without merit. On her own version she contradicts herself by alleging that she proceeded to practice as an attorney in respect of at least two matters after the date of September 2013. After the said date, there were still transactions on her trust account, and at the time this application was brought, her trust account was still open and operating. There were still trust funds available and trust creditors that had not been accounted to. She admitted having notified the applicant of the closure of her firm only during May 2014 and failed to close her trust account and submit her outstanding auditor's report as well as her closing auditor's report.

The closing auditor's report subsequently submitted by the respondent was submitted out of time and the report was qualified in that her accounting records were not updated monthly and reconciled regularly. In my view, these failures are akin to abandonment of her practice.

- [14] I am, therefore, satisfied that the applicant has been able to demonstrate and to establish the offending conduct, on a balance of probabilities.
- [15] The second issue is whether the respondent is a fit and proper person, to continue to practice as an attorney.
- [16] A serious consideration of the respondent's conduct is required to determine whether or not she is a fit and proper person to remain on the roll of attorneys. She failed to provide any explanation for most of her transgressions and in fact admits to such contraventions. Consequently, it is my view that the only reasonable inference that can be made from her conduct in relation to all the charges, considered cumulatively, is that her conduct, does not accord with that of a fit and proper person. Respondent's conduct constitutes deviation from the standards of professional conduct that it cannot be said that she is a fit and proper person to continue practicing as an attorney. It is, therefore, my conclusion that the respondent is not a fit and proper person to be retained on the roll of attorneys.
- [17] The last issue for determination, is whether a person who has been found not to be a fit and proper person should continue to practice as an attorney, or whether he should be struck from the roll or whether an order of suspension will suffice.
- [18] This enquiry also requires the court to exercise its discretion. The court must decide whether the person found not to be fit and proper to practice as an attorney deserves the ultimate penalty of being struck from the roll or whether an order of suspension will suffice.²
- [19] The applicant calls for the suspension of the respondent on the basis that she is not a fit and proper person to continue to practice as an attorney.
- [20] The following was stated in *Law Society, Northern Provinces v Setshogoe* [2009] JJOL 23071 (T), at para 120 -

'It is seldom, if ever, that a mere suspension from practice for a given period in itself will transform a person who is unfit to practice into one who is fit to practice. Accordingly, as was noted in *A v Law Society of the Cape of Good Hope* 1989 1 SA (A) 852E-G, it is implicit in the Act that any order of suspension must be conditional upon the cause of unfitness being removed. For example, if an attorney is found to be unfit of continuing to practice because of an inability to keep proper books, the conditions of suspension must be such as to deal with the inability. Otherwise the unfit person will return to practice after the period of suspension with the same inability or disability. In other words, the fact that a period of suspension of say five years would be a sufficient penalty for the misconduct does not mean that the order of suspension should be five years. It could be more to cater for rehabilitation, or if the court is not satisfied that the suspension will rehabilitate the attorney, the court ought to strike him from the roll. An attorney who is the subject of the striking off application and who wishes a court to consider this lesser option, ought to place the court in a position of formulating appropriate conditions of suspension.'

- [221] The respondent on the other hand, prays that the suspension be suspended with appropriate conditions attached, as an appropriate sanction in the circumstances of this matter. According to the respondent's counsel we should, when penalizing the respondent take her circumstances into account that: she is presently not practicing as an attorney; no act of dishonesty was found against her; there were no persons who laid complainants against her; she did not put the public at risk; and there were no shortages of trust monies involved.
- [222] The respondent's assertion is that conditions which will rehabilitate her should at the discretion of the court be attached to the suspension order, namely: should she decide to go back to practice, she should be debarred from sole practice - she should practice as a professional assistance for a period of a year or two before practicing on her own; and that she undergoes training in the attorneys bookkeeping.
- [23] My view is that, in the circumstances of this case, an order for the suspension of the respondent will suffice. The complaints against the respondent are administrative in nature and as such the deviation complained of, though serious, is not so material that it warrants striking off. I would not say that the conduct complained of reflects upon her character, it, rather relates to the lack of administrative skills and/or capabilities on her part. On the facts of the case, it does not appear that the respondent acquired enough experience to operate her own practice.
- [24] Should the respondent go back to practise, she must be precluded from practising for her own account, either as a principal or in partnership or in association or as a member of incorporation, for a period of two years. Should, she, after the expiry of the period stated herein, choose to practise as stated above in this paragraph, she shall have to satisfy the court that she is a fit and proper person to do so.
- [25] The respondent has since stopped practicing as an attorney and has as of now furnished the applicant with the closing auditor's report. It is thus, no longer necessary to appoint a curator bonis. The applicant must, however, see to it that the respondent's trust account has been properly closed and that all the creditors have been accounted to.
- [26] The applicant has prayed for an order for costs on an attorney and client scale. The general rule in matters of this nature is that the respondent has to pay the costs of the applicant on an attorney and client scale because the applicant is not an ordinary litigant as it performs a public duty.³ On the facts of the present matter, there is no reason, in my view, to depart from the general rule. The cost order against the respondent must be on an attorney and client scale. Indeed, as stated by the applicant's counsel, the applicant must not be burdened with legal costs when launching applications of this nature.
- [27] Consequently, I would make the following order -
- (a) The respondent, Annelie Thirion, is suspended from practice as an attorney of this court until such time as she satisfies the court

that she is a fit and proper person to resume practice as an attorney.

- (b) The respondent is ordered to immediately surrender and deliver to the registrar of this court her certificate of enrolment as an attorney of this court.
- (c) In the event the respondent failing to comply with the terms of this order as detailed in paragraph 2b of this order within two
- (2) weeks from the date of this order, the sheriff of the district in which the certificate is, is authorized and directed to take possession of the certificate and to hand it to the registrar of this court.
- (d) The respondent is ordered to pay the costs of suit on an attorney and client scale.

E. M. KUBUSHI

JUDGE OF THE HIGH COURT

I agree, and it is so ordered

S. POTTERILL

JUDGE OF THE HIGH COURT

APPEARANCES

HEARD ON THE : 12 MARCH 2015

DATE OF JUDGMENT : 16 APRIL 2015

APPLICANT'S COUNSEL : M VAN ROOVEN

APPLICANT'S ATTORNEY : ROTH & WESSELS INC

RESPONDENT'S COUNSEL : L REISER

RESPONDENT'S ATTORNEY : THIRION ATTORNEYS

¹See *Jasat v Natal Law Society* 2000 (3) SA 44, [2001] 2 All SA 310 (SCA) at para 10; *Summerly v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA) at para 2; *Botha and Others v Law Society, Northern Provinces* 2009 (3) SA 329 (SCA) at para 3.

² See *Summerly v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA) para 2.

³ See *Law Society of the Northern Provinces v Dube* [2012] JOL 29446 (SCA) at para 33.

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