

SOUTH AFRICA / JUDGMENT

Law Society of the Free State v Pieterse (2189/2015) [2015] ZAFSHC 163 (27 August 2015) [2015] ZAFSHC 163

COURT

Free State High Court, Bloemfontein

BEFORE

Rampai, Mokoena

CASE / FILE NUMBER

2189/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: 2189/2015

In the

matter of:

THE
LAW SOCIETY OF THE FREE
STATE
Applicant
and
PHILIP
PETRUS PIETERSE
Respondent

CORAM:

RAMPAI, J & MOKOENA, AJ
HEARD

ON:

20
AUGUST 2015

JUDGMENT

BY: RAMPAL, J

DELIVERED ON: 27 AUGUST 2015

- [1] The matter came to court by way of motion proceedings on 11 May 2015. The main relief sought by the applicant was to have the respondent's name struck off the roll of attorneys. The respondent did not oppose the application.
- [2] The respondent, Mr Philip Petrus Pieterse, was admitted as an attorney on the 19 May 1994. He practised as such under the name and style I.A.J. Malherbe, a law practice situated at 50 Voortrekker Street, Philippias in the Free State Province.
- [3] The current application represented the second attempt by "The Law Society of the Free State" to have the respondent

permanently debarred. The first bid to have his name struck off the roll of attorneys was launched over 2 years ago, on 05 May 2013, to be precise, under case number 2012/2013. The complaint of the applicant then was that the respondent had, for three consecutive years, preceding the launching of that application failed to submit unqualified annual trust audit reports in terms of rule 16(B) of the applicant's rules. The respondent's breach of the rule concerned the financial audit periods which commenced on the 01 March 2010 and ended on the 28 February 2013. It was that breach which precipitated the first application.

- [4] The first application was heard by Molemela, J as she then was, and Lekale, J on the 17 October 2013. Their judgment was delivered on the 4 November 2013. The court reasoned that seeing that the dishonesty did not feature in those proceedings the respondent's striking off would, in those circumstances, be too harsh to the respondent and that it would constitute an inappropriate sanction to impose. Consequently the court decided to conditionally suspend the respondent for 18 months instead of altogether debarring him from practice. The suspension was in line with the applicant's alternative prayer – (vide prayer 2 notice of motion).
- [5] The full scope, terms and conditions of the suspension order dated the 4 November 2013 are contained in "anx vm1" to the current application. I deem it necessary to reproduce the suspension order in this judgment in full.

"1. The respondent PHILIP PETRUS PIETERSE is interdicted from practising as an attorney pending:

1.1 submission by him of all outstanding audit reports in respect of 2010/2011; 2011/2012 and 2012/2013 financial years to the applicant;

1.2 finalisation of the winding up of his practice in terms of rule 3B of the rules of FREE STATE LAW SOCIETY pursuant to the sale of his practice or in terms of paragraph (8) infra.

2. Should the incidents in 1.1 and 1.2 above eventuate the applicant shall issue and file with the registrar of this court a certificate to that effect, whereupon, the above interdict viz. (1) shall lapse.
3. The respondent is, further interdicted from, at any stage whatsoever, practising for own account or in partnership or as a director of incorporated practice or as a branch manager of attorney's practice without being in possession of a valid fidelity fund certificate.
4. The respondent is, furthermore, suspended from practising as an attorney for 18 (eighteen) months.
5. The above sanction in (4) viz. suspension is, however, suspended in whole for (3) three years on condition that the respondent shall not be found guilty of either failing, during the period of suspension, to comply with the provisions of rule 16B.3 of the rules of FREE STATE LAW SOCIETY or of practising in capacities set out in paragraph (3) supra without a fidelity fund certificate.
6. The respondent is directed to surrender and deliver to the registrar of this court his certificate of enrolment as attorney, within a period of seven days calculated from date of service of this order.
7. Should the respondent fail to comply with paragraph (6) supra, then and only in that event, the Sheriff of this court is authorised to take possession of the respondent's certificate of enrolment as attorney wherever it may be found and to deliver it to the registrar of this court.
8. In the event of the sale of the respondent's practice not having been approved by the applicant or finalised by 4 November 2013, then and only in such circumstances are orders in terms of paragraph 4 to and including 14 of the Draft Order marked "X" as amended granted.
9. The respondent shall pay the applicant's costs on an attorney and client scale save for the costs reserved on the 15th August 2013 which shall be paid on a scale as between party and party."
- [6] The current application, unlike the previous application, contains no alternative prayer for the respondent's suspension or shall I rather say further suspension. On this occasion the relief sought by the applicant is the ultimate disciplinary sanction, the strike-off. Now the applicant seeks an order crafted in the following stern terms as per the notice of motion:

"1. That it be ordered and declared that Respondent is not a fit and proper person to act as an attorney of this Honourable Court.

2. That Respondent be struck of the roll of attorneys of the Free State High Court, Bloemfontein.

3. That the Respondent be ordered to surrender and deliver to the Registrar of the Free State High Court, Bloemfontein, his certificate of enrolment as attorney, within a period of 7 (SEVEN) days calculated from date of service of this order.

That should Respondent fail to comply, then that the Sheriff of this Honourable Court be ordered and authorised to take possession of the said certificate of enrolment wherever it may be found and deliver same to the Registrar of the Free State High Court, Bloemfontein.

4. That paragraph 4 to and including 14 of the Draft Order, marked “X”, as set out in paragraph 8 of this Court’s order under case number 2209/2013 as amended, be granted.
5. That Respondent shall pay the Applicant’s costs on an attorney and client scale.
6. Further and or alternative relief.”

[7] The gravamen of the current complaint is that the respondent, the suspension order notwithstanding, continues to project himself in public as an attorney and to practice as such. The applicant’s deponent, Mr VM Morobane, who is designated as the applicant’s president, urged us to declare that the respondent is no longer a fit and proper person to practice as an attorney. According to him the evidence, in other words the new facts, constitutes a very strong case of a very serious misconduct committed by the respondent.

[8] Applications of this kind are of a disciplinary nature. It is trite that they are sui generis. In the instant matter, there is no lis between the applicant and the respondent. “The Law Society” is the custos morum of the legal profession. It merely gathered the facts and placed them before us for consideration.

Hassim v Incorporated Law Society of Natal 1977 (2) SA 757 (A) at 767 C – G;

Law Society Transvaal v Matthews 1989 (4) SA 389 (T) at 393 E;

Cirota and Another v Law Society Transvaal, 1979 (1) SA 72 (A) at 187 H;

Prokureursorde van Transvaal v Kleynhans 1995 (1) SA 839 (T) at 851 E – F

[9] The question whether an attorney is a fit and proper person as contemplated in terms of sec 22(1)(d) of the Attorneys Act No 53/1979 is not dependent upon factual findings but lies in the discretion entrusted to us as a court of law.

Law Society of the Cape of Good Hope v C, 1986 (1) SA 616 (A) at 637 C – E;

A v Law Society of the Cape of Good Hope 1989 (1) SA 849 (A) at 851 A – E;

Law Society of Transvaal v Matthews supra at 393 I – J

[10] Firstly, the court must first decide, as a matter of fact, whether the alleged offending conduct by an attorney has been established.

Secondly, if the court is satisfied that the offending conduct has indeed been established, it has to make a valued judgment in order to decide whether the person concerned is indeed not a fit and proper person anymore to practise as an attorney. Thirdly if a court decides that the attorney concerned is not a fit and proper person to practise as an attorney anymore, it must decide, in the exercise of its discretion, whether in all the circumstances of the case the attorney in question is to be removed from the roll or merely suspended from practice. *Kaplan v Incorporated Law Society Transvaal* 1981 (2) SA 762 at 782 A – C. *Reyneke v Wetsgenootskap van die Kaap die Goeie Hoop*

[1993] ZASCA 161; 1994 (1) SA 359 at 369 – 370. *Law Society of the Cape of Good Hope v Buddricks* 2003 (2) SA 11 at 13 I and 14 A – B.

[11] The discretion of the court has to be based upon facts before it and such facts must be proven on a balance of probabilities.

Law Society Transvaal v Matthews supra at 393 I – J;

Olivier v Die Kaapse Balieraad 1972 (3) SA 485 (A) at 496 F – G;

Summerley v Law Society Northern Province 2006 (5) SA 613 (SCA) at 615 B – F

[12] The following facts and circumstances prompted the Free State Law Society to bring the current application:

12.1 The annual trust audit reports for 3 consecutive financial years referred to in the 2013 suspension order were still outstanding as on 11 May 2015 when the current application was filed. The respondent's failure to do so is in breach of paragraph 1.1 of the suspension order.

12.2 The law practice of the respondent was never wound-up before 4th November 2013 since the respondent did not co-operate with the applicant. The respondents conduct constituted breach of paragraph 1.2 of the suspension order.

12.3 The required approval for the sale of the respondent's practice was never given to the applicant by the respondent. His failure to do so constituted breach of paragraph 8 of the suspension order.

12.4 The respondent neglected to surrender his admission certificate of enrolment as an attorney to the registrar of this court. His failure to do so constituted breach of paragraph 6 of the suspension order.

12.5 The respondent continues to practice as an attorney subsequent to the grant of the suspension order as would fully appear from "anx vm3 – vm6." The respondent's action constituted breach of paragraph 3 read with paragraph 4 of the suspension order.

- [13] As regards the first leg of the enquiry, we are required to determine as a matter of fact, whether the respondent's alleged offensive conduct has been established. I proceed to examine the factual allegations made by the applicant to ascertain whether there is substance in the current application to sustain the alleged misconduct.
- [14] On 27 November 2013 a letter was written by one P.P. Pieterse to A.H. Taute of Schoeman Maree Incorporated. The letter concerned an apparent dispute relative to the transfer of a certain residential property situated at Lillyvale Place in Bloemfontein from Ernst Roberts Family Trust to F.D. & K Theron. The letter was written on the official letterheads of a law practice called I.A.J. Malherbe. The respondent's full names appear at the top thereof. At the foot thereof the letter was signed P.P. Pieterse before it was emailed to Mr. Taute. From the aforesaid letter it could be discerned that Schoeman Maree Incorporated, a law firm in Bloemfontein, acted on behalf of the plaintiffs referred to in the letter in question. On 16 April 2014 Schoeman Maree Incorporated, applied to the Bloemfontein Regional Court for summary judgment on behalf of their clients Ernst Evans Roberts N.O. & Another against Frank De Viliers Theron & Another. They summarily claimed payment of the capital amount of R150 000.00 among others (vide anx vm3).
- [15] There can be no reasonable doubt that the respondent was indeed the author of the letter referred to in the previous paragraph. The date of the letter was of particular significance. The respondent wrote the letter on 27 November 2013, about three weeks

after the suspension order was made against him (vide anx vm1 supra).

- [16] On 2 May 2014, less than six months after his suspension, the respondent signed a sworn statement at Philipolis in support of his clients Mr. F.D. Theron's main affidavit - (anx vm6). The affidavit was attached to that of his client as "anx d". The author of the confirmatory affidavit, Philip Petrus Pieterse declared that:

"1.1 Ek is meerderjarige manlike prokureur praktiserend as sulks te I A J Malherbe Prokureurs, Voortrekkerstraat 50, Philipolis, Vrystaat Provinsie.

1.2 Die inhoud van hierdie verklaring ressorteer binne my persoonlike kennis, tensy anders vermeld, en is waar en korrek."

- [17] The applicant's Chief Executive Officer Ms, C.J. Marais decided to investigate the complaint that the respondent was still practising as an attorney. Under the pretext of being a client, she telephoned the respondent's office and, through the receptionist, made an appointment to see the respondent. A consultation was arranged. On 14 January 2015 Ms. Marais

accompanied by the sheriff and the auditor travelled to Philipolis where she confronted the respondent. She found him in his office, confronted him with the complaint that he, contrary to the suspension court order, was still practising as an attorney.

The respondent, who appeared startled and uneasy, failed to refute the allegations levelled at him. He also failed to hand over to the lady his admission certificate which he should have handed over to the registrar. Ms. Marais also perused the respondent's diary and discovered that several dates were booked and reserved for criminal cases in the local district magistrate court. Her subsequent discussion with the local prosecutor strengthen the allegation that the respondent was still practising as an attorney.

[18] On the strength of the foregoing undisputed factual allegations, I find, as a matter of fact, that the alleged misconduct has been established on a balance of probabilities. A compelling case has been made out, in my view, that the respondent continued to practice in flagrant violation of the conditional suspension order imposed on him. He did so from the 27th November 2013 until the 14 January 2015 when the applicant removed all the files of the respondent's clients from his possession.

The first leg of the enquiry is, therefore, decided against the respondent.

[19] As regards the second leg of the enquiry, which now arises in view of the positive finding I have made in connection with the first leg, we are now required to decide, by way of a value judgment, whether the respondent is no longer a fit and proper person to continue practising as an attorney.

[20] The words "fit and proper" are ordinarily used in relation to a person who applies to be admitted and enrolled as an attorney. The two words taken by themselves have a variety of dictionary meanings. For instance, the word "fit" singularly taken has a whole range of dictionary meanings which includes words such as: adopted, adjusted, competent, qualified, deserving or suited to some purpose.

In the case of the word "proper" its great variety of dictionary meanings includes meanings such as: admirable, commendable, excellent, goodly, fine, of high quality, honest, respectable, worthy, apt, fit, suitable of good character or standing.

(See: Oxford English Dictionary Kaplan supra 782 A-B)

[21] The phrase "fit and proper" does not contain two distinct ideas. It is an expression of wide import. Its meaning has to be determined in the context within which it is used. In this particular instance that context is the legislation applicable to attorneys. The immediate context of the section and the broad context of the statute must be borne in mind regard being had to the apparent scope and purpose of the statute at hand. Kaplan supra 782 C- 783 F.

"The indications are therefore that the expression "fit and proper person" in s 15 relates to the personal qualities of an applicant. The expression is also used in s 22 which authorises the Court to strike an attorney off the roll or suspend him from practice if the Court is satisfied that he is not a "fit and proper person" to continue to practise as an attorney."

Kaplan v The Law Society Transvaal 1981

(2) SA 762 (TPD) of 783 G – H per Boshoff J.P.

[22] The expression refers not only to moral suitability of an attorney whose “fitness and propriety” is under the spotlight of inquiry but also to technical competence. As a court we have inherent discretion to regulate and control the conduct of

practitioners even where there is no suggestion of disgraceful or dishonourable conduct attributed to an attorney against whom

allegations of misconduct have been levelled. I do not want to labour the point as regards the respondent’s “fitness and propriety” to hold office as an attorney. I do not want this leg of the inquiry to detain us any longer. The punch line in a nutshell is this: What misconduct by an attorney, an officer of the court, can be more disgraceful or dishonourable than a deliberate, contemptuous and flagrant violation of a court order? It is hard to conceive any misconduct worse than the misconduct the respondent committed. I shudder to think of the legally adverse consequences on the members of the public he unlawfully and unsuccessfully represented under the false pretext that he was a fit and proper attorney to represent them whereas he knew, all too well, that he had been suspended and interdicted from practising as such.

[23] In the light of all this I am of the firm view that the respondent’s misconduct has so tarnished his character and professional profile that he is no longer a fit and proper person to be allowed to continue practising as an attorney. Reyneke *supra* act 303 – 370.

In my view and for the reasons enumerated above the second leg of the enquiry also has to be decided against the respondent.

[24] As regard the third leg of the enquiry, we are called upon to decide whether, in all the circumstances of the instant matter, the respondent’s name must be permanently removed from the roll or whether the respondent must merely and temporarily be suspended from practice. We are called upon to embark upon this last mile of the road by virtue of the preceding finding that the respondent is not a fit and proper person anymore to continue practising as an attorney. At this junction we have to determine the final leg of the inquiry by the exercise of discretion entrusted to us. Buddricks *supra* at 13 – 14 A – B.

[25] The final decision we have to make basically concerns a choice of an appropriate sanction to be imposed on the respondent. Obviously the question of a sanction arises only where the first two legs of the inquiry have been decided against the respondent, as in the instant matter. The sanctioning of a delinquent attorney requires the exercise of a discretion by the court. At this third stage of the inquiry we now have to determine, through the proper exercise of the discretion entrusted to us, whether the respondent, an attorney whom we have already found guilty of gross misconduct on the strength of which we have also found him not to be fit and proper person to carry on practising as an attorney, deserves to have the ultimate sanction of being struck off the roll or whether the sanction of being merely suspended from practice would suffice. Summerly *supra* (2), at 615 I – F.

[26] Elsewhere in this judgment I alluded to the distinction between the 2013 application and the 2015 application. I indicated that the relief previously sought by the applicant against the respondent contained an alternative prayer for the mere suspension of the respondent. However the relief currently sought contains no such a prayer. The applicant decided to go for the jagular this time around. Now the applicant seeks an order for the respondent's outright striking off. Upon my comparative reading of the previous founding affidavit and the current founding affidavit I sensed that now the applicant's attitude has hardened and that now the tone has become unsympathetic towards the respondent. The applicant's deponent and president contended that the contemptuous conduct of the respondent was so serious that it warranted nothing less than the ultimate penalty – striking – off.

[27] The understandable frustrations of the applicant demonstrated the natural indignation, often unspoken, of our society at large when a lawyer betrays the ethical ethos, norms and standards of his honourable vocation. The applicant has, through his contemptuous, disgraceful and dishonourable actions severely tarnished the image of the lawyering community. The gravity of

his misconduct justifies the submission of counsel for the applicant, Mr Williams, that the respondent deserves to be struck-off. I am persuaded by counsel's submission.

[28] During the hearing of his previous application the respondent orally made certain representations to our colleagues. His undertakings,

which were incorporated into the court order, so moved the court that, in the end he was merely suspended where striking-off was

looming large on the horizon. The facts of the current application indicated that he dismally failed to honour his undertakings.

It would seem that he never had any serious intentions to honour his word. In short he deliberately deceived the court. He apparently did virtually nothing after his suspension to facilitate the sale of his practice. He, with contempt, disregarded his suspension order. He continued to practise as an attorney as if the suspension order did not exist at all. The applicant's envoy visited his office and found out that, as far as the respondent was concerned, it was still business as usual.

[29] The respondent has had the benefit of a prior suspension. The suspension did not have the desired rehabilitative effect on him. He shamelessly abused the opportunity he was given to rehabilitate himself. He is not a novice in the legal profession yet he remains unrepentant and delinquent. The magnitude of his shameful behaviour strongly militates against his request that he be merely suspended.

[30] Shortly before the commencement of these proceedings on 20th August 2015, Mr Williams handed copies of the respondent's letter dated 19th August 2015, addressed to the applicant's attorneys. I choose to label the letter "exi a". The respondent's suspension order of 2013 cannot be confirmed. I cannot accede to his request. Firstly, the suspension order lapsed on

5th May 2015, six days before these proceedings were initiated. I suppose that by asking that his suspension order be confirmed he meant to say his suspension order be extended but it may well be that he meant what he said. Secondly I cannot accede to his request because it would be irregular to do so on the strength of a letter. It will be recalled that the respondent did not file an answering affidavit.

- [31] An attorney's neglect to submit one unqualified annual trust audit certificate is a serious matter. The respondent failed to do so not once but thrice before he was suspended. He was given ample opportunity by the applicant to mend his ways but failed. Since the suspension two more annual trust audit certificates had to be submitted by the respondent. There is no reason to believe that he complied with the applicable rule in respect of the financial years which ended on 28th February 2014 and 28th February 2015. All these acts of neglect are matters of grave concern.
- [32] Over a period of 5 years the respondent has defaulted. He did not submit the required annual trust audit certificates. That is the one thing. Over a period of approximately 14 months, the respondent deliberately, and with contempt, defied a court order. This is the other thing. The respondent was suspended approximately 22 months ago. However it appears that notwithstanding the passage of such a long period of time, the respondent's still has no insight into the magnitude of the misconduct he has committed. In his letter, "exi a", he expressed no remorse for what he did. His remorselessness is telling against him.
- [33] In all the circumstances of this particular matter I am convinced that we cannot exercise our discretion in favour of the respondent as regards the sanction. In the light of these I am inclined to decide the third leg of the enquiry as well against him.
- [34] I hold the view, and it is a very firm view, that if we were to suspend the respondent again, then our decision would not be compatible with a proper exercise of judicial discretion. Having considered all the proven factual averments, in the light of all the circumstance of this case, I have come to the conclusion that the ultimate sanction of removal or striking-off is the only appropriate and fitting sanction for the respondent for what he did. I would, therefore, grant the relief as fully set out in the notice of motion read with "anx x" thereto.
- [35] Accordingly I make the following order:
- 35.1 That the respondent is not a fit and proper person to continue practising as an attorney of this court;
- 35.2 That the name of the respondent is hereby removed from the roll of attorneys of the Free State High Court;
- 35.3 That the respondent is directed to surrender and to deliver his certificate of enrolment as an attorney to the registrar of the Free State High Court within 7 days from the date on which this order is served on him;

35.4 That the sheriff of this court is directed and authorised to take possession of the aforesaid certificate, wherever it may be found,

and to deliver it to the registrar of the Free State High Court in Bloemfontein, should the respondent fail to do so on his own accord;

35.5 That the prayers as set out in paragraph 8 of the suspension order read with “anx x” under case number 2209/2013 as amended are granted; and

35.6 That the costs of this application shall be born and paid by the respondent on the scale as between attorney and client.

M.H. RAMPAL, J

I concur

R. MOKOENA, AJ

On behalf of applicant: Adv. A Williams

Instructed by:

RAMOTHELLO RAYNARD INC.

BLOEMFONTEIN

On behalf of respondent: No appearance

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