

SOUTH AFRICA / JUDGMENT

Law Society of the Northern Provinces v Tumagole (24662/2016) [2016] ZAGPPHC 1023 (12 December 2016) [2016] ZAGPPHC 1023

COURT

North Gauteng High Court, Pretoria

BEFORE

AC Basson, PH Malungana

CASE / FILE NUMBER

24662/2016

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
CASE
NO: 24662/2016
12/12/2016

REPORTABLE: NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
In

the matter between: LAW
SOCIETY OF THE NORTHERN
PROVINCES
Applicant
and
MORUTI
RAMOGUDI
TUMAGOLE
Respondent

JUDGMENT**BASSON. J****Introduction**

- [1] This is an application brought by the Law Society of the Northern Provinces ("Law Society") for an order removing the name of the respondent (Mr. Tumagole) from the roll of attorneys alternatively for an order suspending him from practice as an attorney.

Background**facts**

- [2] The respondent was admitted and enrolled to practice as an attorney of this court on 10 April 2001. The respondent practiced on and off as an attorney and was a non-practicing member for various periods the last being 1 December 2009 until 31 July 2010.
- [3] Various financial obligations are placed on attorneys in terms of the Attorneys Act ("the Act") [1] and the Rules.[2] Non-adherence to any of these obligations may result in disciplinary action being taken against such an attorney.
- [4] In terms of rule 70.3 and rule 70.4 of the Rules, for example, every attorney who practices for his own account must cause his auditor to lodge an unqualified report with the Law Society within six months of the annual closing of his accounting records to the effect that the attorney has kept such records as required by the Act and the Rules and further to the effect that there was at all relevant times sufficient monies in his trust bank account to cover his liabilities to trust creditors. The closing date of an attorney's accounting records is the last day of February in each year and the attorney should therefore cause his auditor to lodge the required auditor's report on or before the last day of August of each year. Lodging the auditor's report as required by rule 70.4 read with rule 70.3 is a prerequisite for an attorney to be issued with a Fidelity Fund Certificate as required by section 41 of the Act.

Complaints against the respondent

- [5] The following complaints have been levelled against the Respondent: The respondent had failed to cause his auditor to lodge an unqualified audit report as required by the Rules of the Law Society and, more in particular as required by rule 70.4 read with rule 70.3 for the periods ending February 2014 and February 2015. I have already pointed out that the lodging of the required unqualified audit report in terms of rule 70 is a prerequisite for the respondent to be issued with a Fidelity Fund Certificate in terms of section 41 of the Act. Section 41 of the Act provides that an attorney may not practice for his own account for reward without being in possession of a Fidelity Fund Certificate whilst section 83(1) of the Act makes it a criminal offence for an attorney to do so. An attorney who practices without

such a certificate also places the Fidelity Fund at risk.

- [6] As a result of the respondent not having been issued with a Fidelity Fund Certificate because of his failure to lodge the required

unqualified rule 70 audit report for the years 2014 and 2015, he was not issued with a Fidelity Fund Certificate and accordingly he was not entitled to practice for reward for the years commencing January 2015 and January 2016. As will be pointed out herein below, practicing without a Fidelity Fund Certificate not only constitutes a serious transgression, but also constitutes a criminal offence in terms of the Act.

- [7] It is common cause that in a letter dated 3 November 2014 the respondent was called upon to appear before a Disciplinary Committee

of the Law Society. The charges against him emanated from his failure to cause his auditor to lodge the required unqualified audit report for the year 2014. The respondent attended the disciplinary enquiry and pleaded guilty to the charge preferred against him. The respondent was found guilty and a fine of R 3 000.00 was imposed on him. In a letter dated 9 December 2014 the respondent was informed of the outcome of the hearing.

- [8] It is further alleged by the Law Society that the respondent had abandoned his practice and that he failed to cause his auditor to lodge his firm's closing audit report to this effect. It is also alleged by the Law Society that the respondent has transgressed rule 89.17 of the Rules by abandoning his practice without prior notice to clients.

The disciplinary proceedings

- [9] I have already referred to the fact that the respondent had been charged and found guilty for not having submitted his firm's annual audit report for the financial year 2014. For this transgression he received a penalty in the nature of a fine in the amount of R3000.00 which was payable in two instalments of R1500.00 each.
- [10] I specifically refer to this enquiry in light of the fact that it appears from the papers that the Law Society is again relying on this failure to lodge an audit report for the period ending February 2014 in this application. In other words, the Law Society is relying in this application on a transgression in respect of which the respondent has already been found guilty and fined. I am of the view that the Law Society cannot rely on a transgression in respect of which an attorney has already been found guilty and fined for purposes of these proceedings now serving before this court. I should, however make it clear that I am not taking issue with the fact that the Law Society is also relying in these proceedings on the fact that the respondent did not lodge his audit report with the Law Society for the period ending February 2015 as that transgression was not the subject of the disciplinary hearing. I will now briefly turn to the reasons for my view.

- [11] The Council of the Law Society may appoint a committee in terms of section 67 and more in particular section 67(1)(a) to assist in the carrying out of its duties including performing the duties of a disciplinary committee. In terms of section 67(2) the Council may assign to the disciplinary committee such powers as it may deem fit.
- [12] Section 71 of the Act provides for the procedure that may be followed by the disciplinary committee appointed to inquiry into cases of alleged unprofessional conduct and provides for wide ranging powers ranging from the power to summon any person who is able to give material information concerning the subject matter of the enquiry to interrogating such a person.
- [13] Section 72 provides for the disciplinary powers of the council. In terms of section 72(1) the council may impose a fine not exceeding R 100 000.00; reprimand the attorney; debar such an attorney from engaging or continuing to engage a candidate attorney and may recover from such an attorney the costs incurred by the Council in connection with the enquiry.
- [14] The fact that a matter has been referred to a disciplinary committee does not, however, affect the right of the Law Society to refer the matter to this court in terms of section 72(6) of the Act and apply for the striking-off of an attorney from the role provided that the disciplinary committee has not disposed of the matter finally by having found the attorney guilty and by having imposed a penalty on such attorney after which the Law Society will become functus officio. Put differently, provided that the committee has not finally dealt with the matter, the Law Society may refer the matter to this court and may do so even after a finding of guilty has been made.
- [15] Section 67(2) importantly provides that, if the council has assigned to the (disciplinary) committee the power to enquire into any case of unprofessional or dishonourable conduct and to impose any punishment in respect thereof in accordance of section 72, the council shall not amend or withdraw any decision arrived at by the commission in terms of any power assigned to the (disciplinary) committee. A disciplinary committee therefore acts as an extension of the Council once it has been appointed and once certain powers have been assigned to it by the Council. Any decision taken in accordance with those powers will be final in that section 67(2) specifically provides that the council shall not amend or withdraw any decision including a decision regarding punishment in accordance with section 72. It therefore follows that once the Law Society (through a duly appointed committee) - which is a creature of statute
- has made a decision in terms of section 72 in terms of its disciplinary powers, the Law Society will become functus officio in respect of decisions duly taken by the disciplinary committee in terms of the powers delegated to it by the Council of the Law Society. It further follows that until such decision has been reviewed or set aside, the decision will stand.

- [16] Having regard then to the complaint before the disciplinary committee regarding outstanding audits for the financial year 2014, the Law Society is functus officio: Not only was the respondent found guilty after a guilty plea, the committee also imposed a fine of R3000.00 on him in respect of the transgression relating to the February 2014 audit report.

Proceedings in terms of section 22 of the Attorneys Act

- [17] Proceedings in terms of section 22 of the Act contemplates a three-stage enquiry. In this regard the court in *Botha v Law Society of the Northern Provinces*[3] explained that in terms of the first enquiry the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities. In terms of the second enquiry the court must consider whether or not the person against whom the application is brought is a fit and proper person to continue to practise as an attorney. In terms of the third enquiry the court must inquire whether in all the circumstances, the attorney is to be removed from the roll of attorneys or whether an order of suspension would suffice.[4]
- [18] As a general rule striking-off is reserved for attorneys who have acted dishonestly whilst transgressions not involving dishonesty are usually visited with a lesser penalty of suspension from practice.[5]
- [19] In this case it is not in dispute that the respondent did not misappropriate trust funds: The respondent is not charged with any form of misconduct relating to his trust account.

The first enquiry: the offending conduct

- [20] The respondent is charged with essentially three transgressions: The first is that he did not lodge an unqualified audit report as required by the Rules for the year ending February 2015. I have for the reasons already alluded to, disregarded the transgressions in respect of the year ending February 2014. It is common cause that the respondent did not submit the required report for the year ending February 2015. He, however, submitted that his practice was non-existent at the relevant time and that he did not have any clients.
- [21] The second transgression levelled against the applicant relates to the fact that, because he did not lodge the unqualified audit reports as required, he practiced as an attorney without a Fidelity Fund Certificate for the years 2014 and 2015. This allegation is not denied by the respondent. The respondent, however, explains in his answering affidavit that although he was not in possession of a Fidelity Fund Certificate for the years 2014 and 2015 and although he accepts that he was not entitled to practice for reward for his own account, he did not have any clients during this period and that he had in fact informed the Law Society on 14 May 2015 that he had obtained employment elsewhere. He also submits that during this period and specifically since January 2015 to date he had not received any monies in his trust account on behalf of any member of the public. In response the Law Society submitted that the respondent was obliged in these circumstances to submit a closing audit report which he did not do.

[22] I am in agreement with the submission on behalf of the Law Society: Inasmuch as the respondent claims that he did not have any clients and that that he did not receive any monies from the public in his trust account, the fact remains that he was still on the Roll of practicing attorneys at the relevant time and as such he was obliged to have been in possession of a Fidelity Fund Certificate. Moreover, although the respondent tried his best to persuade the court that he was not practising at the time and that his firm was effectively dormant, his letter to the Law Society dated 14 May 2015 seems to suggest that this was not the case. In this letter the respondent informed the Law Society that the practice was moved to another address. He further informed the Law Society that a decision will be taken at some stage "as to the person who shall be in charge of the practise and his or her particulars shall be made known to yourselves".

[23] If regard is had to the contents of his letter it is clear that the practise was - contrary to what the respondent contends in his papers

- still in existence as of 14 May 2015. A Fidelity Fund Certificate was therefore clearly a requirement for the firm to practise.

[24] I am therefore satisfied that the Law Society has sufficiently established the offensive conduct in respect of Fidelity Fund

Certificates which was not issued as a result of the fact that the respondent had failed to provide the Law Society with the required

annual audit reports.

[25] Practicing without an Attorney's Fidelity Fund certificate constitutes a risk not only to the public but also to the Fidelity

Fund. Such a failure as already indicated also constitutes a criminal offence.[6] It is for these reasons that practicing without being in possession of a Fidelity Fund Certificate is considered to constitute a serious breach of an attorney's duties. Although it will be taken into account as a mitigating factor when considering an appropriate sanction that the respondent did not have clients during the relevant periods, the fact that he had no clients and received no monies in his trust account does not detract from the fact that it constitutes a serious transgression to practice without the necessary Fidelity Fund Certificate.

[26] In respect of the closing audit report it is accepted that in terms of the Rules an attorney must lodge his firm's closing audit report as required by the Act. The respondent disputed that it was incumbent upon him to submit a closing audit report because he did inform the Law Society on 14 May 2015 that he had obtained employment elsewhere. He also disputed the allegation that he had abandoned his practice. Again, inasmuch as the respondent attempts to persuade this court that he did not abandon his practice that much is clear from the papers: Mapfumo visited the respondent's firm's given address and found no trace of the respondent and of his firm. It was under those circumstances incumbent upon the respondent to submit his closing audit report which he had not done. The respondent also

placed no documents before the court that prove that he did in fact inform the Law Society that he was closing down his firm and that he has filed the firm's closing audit report. It was only after Mapfumo visited the premises that the Law Society gained knowledge of the fact that the respondent had abandoned his practice.

[27] I am therefore satisfied that the Law Society has sufficiently established the offensive conduct in respect of the closing audit report. Against the background of these conclusions, the court now has to consider whether the respondent is fit to continue practising as an attorney.

The second enquiry: is the respondent a fit and proper person to continue practicing?

[28] Attorneys are officers of the court and has a duty to comply with the prescripts of the Act and the Rules regulating the conduct

of attorneys. As already repeatedly stated, an attorney is not entitled to practise for his own account without being in possession

of a Fidelity Fund Certificate. In this regard the court in *Law Society of The Cape of Good Hope v Adams*[7] stated that it is taken for granted that an attorney who practices without a valid Fidelity Fund Certificate contravenes section 83(10) of the Act.[8]

[29] In *Law Society, Northern Provinces v Mogami and others*[9] the court also accepted that the failure to submit audited reports and to practice without a Fidelity Fund Certificate are serious offences:

"[25] I have with reservations concluded that the respondents are not unfit to continue practicing as attorneys. The particular complaints dealt with indicate a level either of incompetence, inattention or inability to do professional work but the seriousness is not such as to disqualify them from practising. More serious were the failure to submit their auditor's report and the fact that they practiced without fidelity fund certificates."

[30] I have considered the circumstances and I am of the view that despite these transgressions it cannot unreservedly be concluded that the respondent is not fit to continue practicing. However, despite the fact that I have come to this conclusion, the court still has a discretion to consider whether to impose an appropriate sanction on a respondent found guilty of a transgression. In this regard the Supreme Court of Appeals in *Law Society, Northern Provinces v Mogami and others*[10] held as follows:

"[27] The finding that the respondents are guilty of unprofessional conduct but that they are fit to continue to practise does not mean that it is the end of the inquiry. We are entitled to discipline them by suspending them from practice with or without conditions or by reprimanding them (*Malan and Another v Law Society, Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 {SCA} ([2009] 1 All SA 133; [2008] ZASCA 90) para 5)."

The third enquiry: the sanction

[31] I now turn to the third leg of the enquiry namely what an appropriate sanction would be in the circumstances. In this regard the court has a discretion to consider the appropriate sanction and must do so taking into account all the circumstances.

[32] Although it is undoubtedly a serious offence to practice without a Fidelity Fund Certificate following a failure to submit unqualified audit reports and failing to submit a closing audit report, I am of the view that the conduct of the respondent in this matter warrants considering a penalty of suspension. I am further of the view that it is appropriate to order that the respondent's suspension from practice be conditionally suspended.

[33] I accordingly make the following order:

(i) Moruti Ramofudi Tumagole {the respondent} is suspended from practicing as an attorney of this Court for a period of one year. His suspension is suspended for a period of three years on condition that he does not make himself guilty of any of the provisions of the Attorneys' Act and the Law Society's Rules during the period of suspension;

(ii) The respondent is to pay the costs of this application on the attorney and client scale.

AC BASSON

JUDGE OF THE HIGH COURT

I agree

PH MALUNGANA

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the applicant

: Mrs. Magardie

Instructed by

: Damons Magardie Richardson Attorneys

For the 2nd respondent : Adv. CA da Silva SC

Instructed by

: Fasken Martineau

[1] Act 53 of 1979.

[2] The Rules of the Law Society was replaced by a new set of Rules with effect 1 March 2016. In light of the fact that the alleged

transgressions levelled against the respondent took place at a time that the old Rules were still applicable, the conduct of the respondent is assessed in terms of the previous Rules.

[3] 2009 (3) SA 329 (SCA) para [4].

[4] See also: *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) at 51C-1.

[5] See *Summertey v Law Society, Norlthern Provinces* 2006 (5) SA 613 SCA at para [21] and *Malan and Another v Law Society of Norlthern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 (SCA).

[6] Section 83(10) of the Attorneys Act provides that any person who directly or indirectly purports to act as a practitioner in his own account or in partnership without being in possession of a fidelity fund certificate shall be guilty of an offence.

[7] 2013 (2) SACR 480 (WCC).

[8] At paragraph [19].

[9] 2010 (1) SA 186 (SCA)

[10] *Ibid.*

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Prepared on 14 October 2026 · Esheria