

SOUTH AFRICA / JUDGMENT

Selota v South African Legal Practice Council (85227/2019) [2020] ZAGPPHC 85 (9 March 2020)

[2020] ZAGPPHC 85

COURT

North Gauteng High Court, Pretoria

BEFORE

E Van Olst

CASE / FILE NUMBER

85227/2019

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IN THE HIGH COURT OF SOUTH
AFRICA
(GAUTENG DIVISION PRETORIA)

Case

No 85227/2019

9/3/2020

In

the matter between:

MAMOLATELO
ALFRED
SELOTA
Applicant
and
THE
SOUTH AFRICAN LEGAL PRACTICE COUNCIL
Respondent

JUDGMENT

VAN OLST, AJ

[1] The applicant issued a Notice of Motion by way of urgency, for an order declaring that the applicant is entitled to a Fidelity Fund

Certificate in terms of Section 85 of the Legal Practice Act as from 5 February 2019.

- [2] Mr Da Silva on behalf of the Applicant handed up a "Bundle of Additional Documents".
- [3] The application was initially enrolled as an urgent application for 21 November 2019, then re-enrolled for hearing on 3 December
2019. The application was removed from the urgent roll of 3 December 2019 and re-enrolled on the normal opposed motion roll and heard on 17 February 2020.
- [4] Subsequent to the application being removed from the urgent roll of 3 December 2019, the following:
- [5] The applicant amended his Notice of Motion in terms of Rule 28, which proposed amendment was not opposed. Amended pages of the Notice of Motion was included in the "Bundle of Additional Documents". In as much as the "Bundle of Additional Documents" was submitted at the commencement of this application, I am entitled to have regard to the contents thereof.

"Bundle of Additional Documents":

- [6] 1. The order by the Honourable Mavundla J on 7 January 2020:

"1 Pending the interim decision (the suspension application under case number 43012/18) by the Honourable Rabie J and Avvakoumides AJ an order is granted in the following terms:

1.1 The Respondent is directed to immediately sue a Fidelity Fund Certificate as envisaged in section 85 of the Legal Practice Act, Act 28 of 2014, for 2020, in favour of the Applicant.

1.2 That the costs occasioned on 7 January 2020, which include the costs of two Counsel are reserved for determination by the Honourable Court at the final disciplinary hearing under case number 43012/2018."

2. The application as envisaged in terms of prayer 1 of the Court Order dated 7 January 2020 was dispensed with and judgment delivered on 7 February 2020. As a result of the Judgment by Mr Justice Avvakoumides AJ and Mr Justice Rabie J, a draft order was consequently made an order of court on 7 February

2020. It is necessary to deal with the relevant paragraphs in the aforesaid judgment as well as the Order granted on 7 February 2020:-

Judgment by the Honourable Rabie J and the Honourable Avvakoumides AJ:

3. This was the application under Case Number 43012/2018 referred to in prayer 1 of the Order [above] where The Law Society of the Northern Provinces was the applicant and Mamolatelolo Alfred Selota was the respondent. The applicant [LPC] applied for an order that the respondent's [Mr Selota's] name be removed from the roll of practising attorneys, alternatively that the respondent be suspended from practice pending the finalization of the application for removal.

4. The application was set down for hearing on 21 November 2019. On 29 October 2019 the respondent filed an application in terms of rule 6(5)(e) wherein he applied for leave to file a supplementary affidavit to be received as evidence in the main application. The supplementary affidavit included a report by Mr Muller, and is aimed at the bookkeeping system used by the respondent in order to show that the respondent does not have any trust deficits. On 21 November 2019, the respondent handed in a second application in terms of rule 6(5)(e) seeking leave to file a further supplementary affidavit to be received in evidence in the main application. The applicant did not oppose the applications by the respondent. The only issue to determine is whether the respondent should be suspended from practice pending the finalisation of the main application. The main complaint against the respondent is his continued failure to practice without a Fidelity Fund Certificate following his trust audit report.
5. The fact remains that the respondent [Mr Selota] is practising without a fidelity fund certificate which the court could not ignore at that stage of the proceedings. It was pointed out that to permit the respondent to continue practising without the required certificate would be tantamount to the court enabling the perpetuation of the offence. It was furthermore pointed out that in *Law Society of the Northern Provinces and Another v Louw De Witt Le Roux and Others* 2015 ZASCA at 168, the Supreme Court of Appeal held that the applicant's resolution not to issue a fidelity fund certificate constitutes an administrative action and is thus reviewable under PAJA. In that case the High Court's decision compelling the Legal Practice Council to issue a fidelity fund certificate was set aside and it was held that the correct procedure for a practising attorney under the prevailing circumstances is to take the resolution of the application on review and not to launch an application to compel the issuing of a certificate.
- [6] The respondent did not bring a review application and only after the applicant had taken steps against him, did the respondent allege to have made enquiries to obtain assistance from a suitable person with accounting knowledge. Considering the current position vis a vis the absence of a Fidelity Fund Certificate, the many alleged inexplicable trust transfers, deficits and balances (not specifically mentioned in the judgment, but considered), it was the view that a suspension order is warranted. The risk of the respondents clients whilst the respondent is practising without a Fidelity Fund Certificate was considered.
7. The judgment concluded with the following:

"16. Consequently I make the following order:

 - 16.1 The respondent's two applications in terms of Rule 6(5)(e) are granted.
 - 16.2 The applicant is afforded until the close of business on 21 February 2020 to file replying affidavits.
 - 16.3 The costs of the two Rule 6(5)(e) applications shall be costs in the cause.

16.4 The main application is postponed sine die.

16.5 In respect of the suspension of the respondent, the attached draft order, marked "X", is made an order of court." .

8. Order granted on 7 February 2020:

[a] Prayer 1.1 of the Order - the name of the respondent be suspended from practising as an attorney of the High Court of South Africa pending the finalization of the application for the removal of his name from the roll of attorneys.

[b] Prayer 1.2 of the Order - the respondent hands and delivers his certificate of enrolment as an attorney to the Registrar of the High Court of South Africa.

[c] Prayer 1.3 of the Order - should the respondent fail to comply with the terms of this order detailed in the previous paragraph within 2 [two] weeks from the date of the order, the sheriff be authorized and directed to take possession of the certificate and to hand it to the Registrar of the High Court.

[d] Prayer 1.4 of the Order - the respondent is prohibited from handling or operating his trust accounts as detailed in paragraph 1.5.

[e] Prayers 1.5 to 1.11 of the Order - Mr Johan van Staden the head of members affairs of the application or any-person nominated by him, be appointed as curator bonis (curator) to administer and control the trust of account of the respondent and all related relief set out in the said prayers.

[f] Prayer 1.12 of the Order - The costs of the application be paid by the respondent on an attorney and client scale."

9. A copy of the judgment by the Supreme Court of Appeal under case number 815/2015 was furthermore included in the "Bundle of Additional Documents".

Application under Case Number 43012/2018:

[7]

1. The parties referred to the application under case number 43012/2018 [consisting of 1389 pages] and cross references were made to the said application in the parties' respective Heads of Argument as well as the affidavits filed by both applicant and respondent. It is trite that in as much as extracts from the said application are not incorporated in the affidavits in this application and in as much as copies of documents referred to in the application under case number 43012/2018 are not attached to the affidavits in the present application, regard will not be had to cross- referencing to documents contained in the application under Case number 43012/2018.

2. Mr Da Silva conceded the above.

[8]

1. Mr Da Silva on behalf of the Applicant:
 2. It is important for the applicant that a Fidelity Fund Certificate be issued for the relevant period and will play a crucial role in the disciplinary hearing if the applicant be armed with a Fidelity Fund Certificate at such hearing. The issuing of the Fidelity Fund Certificate for the relevant period will have an impact on the disciplinary hearing.
 3. The applicant has a personal injuries practice and has a turnover of between R9 million to R11 million per annum as per the report by the independent auditor Mr Moyana with reference to the period March 2017
 - February 2018.
 4. The only issue is whether respondent has not and the basis on which the respondent can deny and/or denied the issuing of the Fidelity Fund Certificate is in respect of the debit balance of R103,941.85 [hereinafter referred to as "R103,000.00").
 5. The letter by Ms Mpete previously in the employ of the respondent is a confirmation that if the firm [applicant's practice] pays R103,000.00 into the trust account the deficit of R103,000.00 will be resolved. The applicant provided proof of payment of the said amount into his trust account.
 6. The applicant paid prescribed fees and charges imposed by the Respondent as well as his membership fees and fees for late submission of the audit report.
 7. The respondent never formally refused to issue the applicant with a Fidelity Fund Certificate and provided no reasons why the applicant
- should not be issued with a Fidelity Fund Certificate. The applicant complied in that he supplied copies of journals as per the indication by Ms Mpete. Applicant furthermore provided Ms Mpete an exposition of allocations.
8. The applicant will argue that the respondent is sui generis but in terms of Section 85(6) of Legal Practice Act, when application is made for the issuing of a Fidelity Fund Certificate the Legal Practice Council must issue same in terms of Rule 54.29 and 54.30 of the Legal Practice Act. Rule 54.29 deals with an unqualified audit report and a Fidelity Fund Certificate must be issued if the respondent is satisfied that trust account is in order.
 9. The fact that applicant's audit report for 2020 was unqualified must be taken into consideration
 10. The letter by Mr Gladman Monyane, dated 24 October 2019, addressed the issues respondent had with the qualified audit report. Reference was made to the Affidavit by Gladman Moyana (which Affidavit in the documents before me was unsigned). According to Mr Da Silva, the original Affidavit was handed to the Honourable Avvakoumides AJ on 21 November 2019.

11. Two facts are common cause:

[i] In terms of the auditor's report dated 2 November 2018, the question of the elimination of creditors' with debit balances in the sum of R103,000.00 is in dispute.

[ii] The question whether the applicant provided a satisfactory explanation regarding the 14 creditors' debit balances in the sum of R103,000 .00.

12. The applicant complied with the requirements and specifically that transfers were made from the business account and not from the trust account. The contradictory explanations by the applicant were fully dealt with in the report by Mr Muller. The respondent failed to address the contradictory versions in the answering affidavit and addressed same from the bar. The applicant did not have time to deal with same in his replying affidavit. The correct version is contained in the report by Mr Muller. Reference by Mr Groome on behalf of the respondent, to page 100 is an unfair attack on the applicant.

13. At no stage did the respondent inform the applicant what documentation the respondent requires. The documentation required by Ms Mpete were provided. The version of the respondent regarding Ms Mpete cannot be accepted in that there is no supporting affidavit by Ms Mpete and/or any other employee of the respondent to confirm the correctness of the version by the respondent.

14. The applicant complied with Rule 54.30 and Chapter 7 of the Legal Practice Act and as such a Fidelity Fund Certificate as at 15

February 2019 must be issued.

15. The application is very important to the applicant and as such the applicant requires the service of two counsel. The applicant's whole practice hinges on the order to be granted.

[9] Mr Groome on behalf of the Respondent:

1. The audit report for the relevant period remains qualified in that the applicant failed to provide the respondent with information to satisfy the respondent that the firm's trust account is in good order and that the applicant remains a fit and proper person to continue to practise. The respondent is not satisfied that the applicant complied with the provisions of Chapter 7 of the Legal Practice Act.

2. The qualification of the audit report was inter alia due to a reallocation journal passed between trust creditors' accounts to eliminate trust creditors with debit balances. The applicant failed to provide sufficient supporting documentation to his auditors to verify the accuracy of the journal. The applicant has still not provided supporting documentation to verify the accuracy of the journal.

3. Ms Mpete specifically indicated in the correspondence addressed to the applicant:

" I further indicated that for the audit to be approved, we also need to consider whether your explanation for the debit balances is satisfactory. I indicated during our conversation that we require written response to the auditor's comments to the qualifications."

4. The following was inter alia indicated in the report by Muller Webber Wilsenach Accounts, received on 25 July 2019, in answer to, inter alia, the report by Mr Farris:

"On 16 February 2017, the RAF has paid an amount of R115,876.02 which was for costs. This total receipt amount was allocated to the account of Gogela NP. After this amount was allocated to the one account, the internal bookkeeper has noticed that it should have been allocated to various trust ledger accounts and not just the ledger account of Mr Gogela for costs. An amount of R103,941.85 was reallocated to 14 other trust ledger account instead of just the one account."

5. On 21 November 2019 the applicant proceeded with a striking out application in the main application, a mere 6 court days before launching the present application. The said application was dismissed in that the audit report remained qualified. There are many significant activities on the trust account and applicant failed to provide adequate and absolute assurances regarding the audit report.
6. In essence, the applicant provided two explanations regarding the qualified audit report with specific reference to the sum of R103,000. 00:

[i] The debit balances on the trust account is a factual deficit and journal entries passed between the trust accounts cannot eliminate the deficit.

[ii] The second explanation is that there was a trust creditor of Gogela NP "sitting with a credit of R180,000 which funds were due to the firm". The mis-allocation of fee journals in respect of the 14 trust creditors, were rectified by applying the funds in Gogela's account against the trust creditors.

7. The problem is that the applicant utilized journal transfers from his trust account to rectify the deficit trust balances pertaining to the 14 trust creditors. When the applicant was informed of the discrepancies and in fact informed what the respondent requires,

inter alia, an explanation and supporting documentation, the applicant failed to adhere to the request. The applicant has still not compiled with the enquiries addressed to him and has still not provided the outstanding documentation. The provisions of Rule 54.30 is clear, the applicant shall comply with the requirements addressed to him. The bigger issue is that the applicant vaguely explains why the accounts were overdrawn 14 times - this is a highly irregular procedure. It was specifically explained that the source documents are required and Mr Muller [on behalf of the applicant], although Mr Muller attached numerous documentation to his report, still did not comply with the request by the respondent pertaining to the outstanding documents. The journals handed to Ms Mpete did not suffice. The rectified ledger accounts submitted also did not suffice. The applicant is aware of the nature of the documents required by him in terms of the Rules of the Legal Practice Council.

8. It is common cause that the applicant has a qualified audit report. The applicant did not comply with Rule 54.30 and does not explain why he failed to comply with Rule 54.30. The onus is on the practitioner to explain the irregularities in his trust account and provide the required documentation. Similar transactions were discovered with no justification. The applicant is apparently of the view that in the light of the explanation given by Mr Muller, it is not necessary to provide the supporting documents. The report by the applicant's expert does not provide any documents to substantiate his findings nor does the expert appears to have considered any documents to substantiate the debit findings.
9. The applicant cannot have a set off ledger accounts and his various subsequent versions does not support the version in his first letter.
10. The applicant must satisfy the respondent regarding the handling of trust monies during the period under review. According to the report by Mr Farris, the accounting records of the applicant are in "shambles" and there are a string of other irregularities pertaining to the applicant's trust account as a result of which the application should be dismissed. In terms of Section 85(6) of the Legal Practice Act the respondent must be satisfied that the applicant is entitled to a Fidelity Fund Certificate. Chapter 7 of the Legal Practice Act specifically deals with the requirements that need to be met, during the period under review.
11. It is clear from the Heads of Argument it is clear that:
 - [i] The procedure followed by the applicant is an abuse of process.
 - [ii] The applicant took no steps to remedy the position and did not do so over a couple of years.
 - [iii] The fact that the applicant avers that his clients and staff members are prejudiced do not remedy his failure to address the issues at hand to enable him to obtain a Fidelity Fund Certificate for the relevant period.
12. As a result of the applicant's conduct, the application should be dismissed with costs on the attorney and client scale. The utilization of two counsel, is unnecessary. Multiple and irrelevant documentation were included in the application and reference by the applicant to irrelevant legislation must also be taken into account.

Law Society of the Northern Provinces v Le Roux [above]

- [10] It was specifically held that the resolution by the Law Society of the Northern Provinces not to issue a Fidelity Fund Certificate should have been taken on review. It was specifically stated in paragraph [15] of the said judgment:

"[15] I agree with the Law Society's contention that the chief hurdle for the respondents is that their application is targeted at the wrong party "

[11]

1. It is clear from the Order by the Honourable Mavundla J granted on 7th January 2020 that:

"1. Pending the interim decision (the suspension application under case number 4301212018) by the Honourable Rabie J and Awakoumides AJ an order is tranfgted in the following terms: "

2. The suspension of the applicant to practise as an attorney was in fact granted by the Order by the Honourable Rabie J and Avvakoumides AJ on 7th February 2020.

3. The Judgment by Avvakoumides AJ clearly states:

'[i] The main complaint against the respondent is his continued failure to practice without a Fidelity Fund Certificate, following his trust audit report for the period ending 28 February 2018 and thereafter to date of this hearing: .

4. The Judgment continues:

"[12]. According to Mr Faris, the applicant's audit inspector, the respondent's books contains serious and widespread contraventions of the Act and the applicable rules. The respondent has failed to keep proper financial records, there were irregular withdrawals of trust funds and repeated trust deficits including the respondent's failure to account for funds erroneously transferred into his trust account for a period in excess of 3 years and 6 months.

[13]. Of major concern is that the respondent is alleged to have paid an amount of approximately R3 million into his trust account during the period in which Mr Faris was conducting the audit, when he realised that he had a trust deficit.

[14]. However, the fact that the respondent is practising without a fidelity certificate is not something the court can ignore at this stage of the proceedings. To permit the respondent to continue practising without the required certificate would be tantamount to this court enabling the perpetuation of an offence.....

15. In this case the respondent did not bring any review application and only after the applicant had taken steps against him, the respondent alleges to have made enquiries to obtain assistance from a suitable

person with accounting knowledge. Considering the current position vis a vis the absence of a Fidelity Fund Certificate, the many alleged inexplicable trust transfers, deficits and balances (not specifically mentioned herein, but considered), it is my view that the suspension order is warranted. Of critical importance is the risk which the clients of the respondents are exposed to. The respondent alleges to have approximately 19000 clients. All of these clients are at risk whilst the respondent is practising without a certificate:.

[12] In the premises and regard having been had to the fact that the applicant has still not yet provided a detailed explanation for the different versions why funds were transferred from his trust account to defray the trust deficits of 14 creditors alternatively why funds were allocated to Gogela NP and thereafter re-allocated to the 14 clients' accounts to defray the trust deficits have not been explained, nor did the applicant provide the outstanding documentation to support his versions as set out above. The applicant relied on the report of Mr Muller and the explanation by Mr Muller, without providing any supporting

documentation as specifically requested by the respondent. The documentation attached to the report by Mr Muller, according to the respondent, do not comply with the outstanding requirements of the respondent. The applicant is well aware of the provisions of the Legal Practice Act, Chapter 7 as well as the Rules and failed to comply with same.

[13] The applicant failed to bring a review application as referred to in the judgment by the Honourable Rabie J and the Honourable Avvakoumides

AJ. The applicant was obliged to bring a review application (see *Law Society of the Northern Provinces v Le Roux* above).

[14] The issuing of a Fidelity Fund Certificate for the relevant period does not detract from the fact that the applicant has subsequently been suspended to practise as an attorney of this Court. The suspension of the applicant to practise as an attorney of the Honourable Court did not solely rely on the issuing of the Fidelity Fund Certificate for the specified period but the Honourable Rabie J and the Honourable Awakoumides AJ also took the other factors into account as per their judgment.

[15] The main argument by the applicant was that he requires the Fidelity Fund Certificate for the relevant period in that it will have an impact on the disciplinary hearing and furthermore that his whole practice hinges on the issuing of the Fidelity Fund Certificate for the relevant period.

[16] The nature of the application does not require the services of two counsel and the applicant failed to provide the respondent what was required from him and as such he did not comply with the Legal Practice Act and/or Chapter 7. The applicant failed to proceed with a review application in terms of PAJA which he was obliged to do. The conduct of the applicant and his failure set out above, warrants a special cost order on the scale as between attorney and client.

Order:

1. The application for the relief sought in terms of prayers 2.1, alternatively 2.2 of the amended Notice of Motion is dismissed.
2. The applicant is to pay the attorney and client costs of the respondent.

E VAN OLST

Acting Judge of the Gauteng Division

Pretoria

Application heard on 17 February 2020 and 18 February 2020

Counsel for Applicant:

Adv Da Silva SC

Adv Mothlape

Instructed by:

Rammutla-at-Law Inc

Counsel for Respondent:

Mr L Groome

Instructed by:

Rooth & Wessels Inc

Judgment

handed down on

9 March 2020

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