

SOUTH AFRICA / JUDGMENT

South African Legal Practice Council v Motholo and Another (37828/22) [2024] ZAGPPHC 167 (20 February 2024)

[2024] ZAGPPHC 167

COURT

North Gauteng High Court, Pretoria

BEFORE

N V Khumalo

CASE / FILE NUMBER

37828/22

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 37828/22

REPORTABLE

OF

INTEREST TO OTHER JUDGES

REVISED

DATE:

20/02/2024

In

the matter between:

SOUTH
AFRICAN LEGAL PRACTICE
COUNCIL
APPLICANT

and

TEBOGO
BERNETTE
MOTHOLO
1ST RESPONDENT
MTHOLO
T.B INC ATTORNEYS

2nd

RESPONDENT

This

judgment was handed down electronically by circulation to the

parties' representatives by email. The date and time of hand-down is deemed to be 20 February 2024.

JUDGEMENT

N V KHUMALO J

Introduction

- [1] This is an application by the South African Legal Council, the Applicant, for the revival of a rule nisi against the Respondents, Mr T B Mtholo and TB Mtholo Incorporated Attorneys, that had lapsed as a result of failure by the Applicant's attorney to enroll the matter for hearing on the return date furnished by the Registrar.

The Parties

- [2] The Applicant, the South African Legal Practice Council ("LPC") is a body corporate established in terms of s 4 of the Legal Practice Act 28 of 2014 ("the LPA Act") with full legal capacity and exercises jurisdiction over all legal practitioners as contemplated in the LPA. The 1st Respondent is an attorney of this Honourable Court, admitted and enrolled as such on 13 November 2012. He is presently practising

without a Fidelity Certificate.

Background

facts

- [3] The Applicant had on 16 September 2022 obtained an order for interim relief against the Respondents suspending the 1st Respondent from practice as a legal practitioner with immediate effect as per s 43 of the LPC Act, pending an Application for his

removal from the roll of the Honourable Court's legal practitioners being heard. A rule nisi calling on the 1st Respondent to come and show cause why the order for his immediate suspension was not to be confirmed was issued with a return date which was later confirmed to be 15 November

2022. The Applicant requires that the rule nisi be revived with provisions of the said rule nisi to operate as an interim order with a new return date, alternatively reviving the lapsed rule nisi by confirming same as a final order suspending the Respondent from practicing as a legal practitioner pending the hearing of part B.

- [4] The order was obtained following a complaint that was laid with the Applicant by one of the Respondent's client a Mr Molise. The Respondent had settled a dispute between Mr Molise and one of the banks in a matter relating to Mr Molise's mortgaged bond, whereupon it was agreed that Mr Molise will pay an amount of R550 000.00 into the Respondent's trust account

for onward payment to the bank in settlement of his bond. Although Mr Molise paid the amount in full into the 1st Respondent's trust account, the 1st Respondent only paid an amount of R400 000.00 to the bank. A letter of demand from Mr Molise failed to yield a response from the 1st Respondent, which caused Mr Molise to lay a complaint with the Applicant on 7 May 2021. The 1st Respondent allegedly used Mr Molise's balance of the money to pay another of his clients in an unrelated matter.

- [5] Accordingly the Applicant instructed an auditor Mr Reddy to conduct an inspection of the 2nd Respondent's accounting records, practice affairs and the complaint lodged. Mr Reddy did not get any cooperation from the 1st Respondent as a result he obtained the trust's financial statements directly from the 2nd Respondent's bank. Mr Reddy reported to have found a trust deficit in the 2nd Respondent's trust account and recommended that the matter be referred to Council for consideration of an appropriate action. In the mean time, the Applicant brought an urgent Application to court for the suspension of the 1st Respondent from practice.
- [6] The matter came before court on 16 September 2022 and an order was made suspending the 1st Respondent from practice with immediate effect and appointing in the interim a curator bonis for the 1st Respondent's practice. The 1st Respondent was prohibited from operating the 2nd Respondent's trust account and from handling any trust funds pending finalisation of the Application. A Rule Nisi was issued with a return date of 15 November 2022 for the Respondents to come and show cause why the order for suspension should not be confirmed or set aside pending a full investigation of the matter by the court. The curator was to conduct an investigation and an audit of the 2nd Respondent's trust account and report to the court on 9 November 2022. In essence the granting of the interim relief was as an adjunct to a rule nisi to provide protection to the litigants.
- [7] The curator bonis subsequently filed his report on 7 November 2022 confirming a closing balance in the trust account of R30.37 and

claims pending against the trust account of R192 215.00 leaving a prima facie deficit of R192 184.63.

Lapse of the Rule

- [8] The Attorney acting for the Applicant, Ms Phahlamohlaka submits that she erroneously diarized the final enrolment of the return date of 15 November 2022 on 10 November 2022. Upon realizing her error on 10 November 2022 "she attended court to request the Registrar to enroll the matter as the return date was 15 November 2015 and should it not be enrolled the rule nisi will lapse." She was advised by the Registrar that she could not be assisted as the roll was finalized and already out. On the advise of the Registrar, she approached the head Judge's chambers. The Registrar was unwilling to enroll the matter as a result of her failure to follow the Consolidated Court's Directive 2 of 2022, she therefore could not be assisted. She alleged that she could not resolve the issue after numerous attempt. The matter could not be enrolled and consequently the rule nisi lapsed.

Prejudice

- [9] According to the Applicant, following the lapse of the rule nisi and demand by the 1st Respondent, the hold over the 2nd Respondent's trust account was released and the files returned to 1st Respondent in November 2022. The Applicant argued that this has placed the trust creditors and the Legal Practitioners Fidelity Fund ("the LPFF") at risk. Should the 1st Respondent be allowed to continue to practice, the risk will continue as he would be operating his trust account with a continuous trust deficit and without a Fidelity Fund Certificate. The 1st Respondent has misappropriated trust monies for purposes they were not intended. Also one contingent claim has been lodged with the LPFF for an amount of R102 215.00.

Opposition

- [10] In disputing the allegations made by the Applicant's attorney, the 1st Respondent submitted that the Rule Nisi lapsed not because there was no appearance by Applicant as is provided by the Rules but due to Applicant's attorney having erroneously diarized the final enrolment of the date of 15 November 2022 which resulted in her failing to enroll the matter timeously. The situation is not provided for by the Rules, specifically Rule 27 (4), as a result the court is not empowered to revive the rule which has lapsed under such circumstances.

- [11] The Respondent further pointed out that notwithstanding, the Applicant's attorney wrote a letter to Judge Kuny's Registrar on 27 September 2022 informing the Registrar that she obtained a return date of 15 November 2022 and not the 10 November 2022 whilst

enquiring as to when they should expect to receive the signed rule nisi. The rule nisi order was then uploaded on case line on 4 October 2022 with the return date of 15 November 2022. Ms Phahlamohlaka alleges to have tried on numerous occasions thereafter to rectify the situation without elaborating as to when and how she did that. The Respondent further argues that the court cannot revive the matter and overrule the Senior Judge.

- [12] In his response to the allegations of prejudice by the Applicant, the 1st Respondent points out that he has settled the complaint by Molise, paid an amount of R60 000 and signed an agreement with Mr Molise on 11 November 2022 in terms of which he has agreed to pay the remaining R90 000 by instalment of R45 000, that was to be made in November and December 2022. He alleges to have been complying with the arrangement in that he paid Mr Molise an amount of R60 000 in October 2022 and R50 000 in December 2022. The amount outstanding at the time of his answering Affidavit alleged to be R40

000. He also alleged in his supplementary affidavit filed in July 2023 to have subsequently settled in full the amount owed to Mr Molise who has then signed a settlement agreement confirming his withdrawal of the complaint.

- [13] In respect of the claim for R102 253 00 that is reflected in the Curator's report, the 1st Respondent explained that he received an amount of R90 215 into the trust account which was a deposit towards a purchase of a property on auction from Alberton North Sheriff. The

amount of R60 785 was paid to the Sheriff and R10 000 to Mr Ngobese the said property agent and R19 000 to the seller as an advance on the purchase price. The total paid being R89 785.78 and R429.22 used for attorneys fees. He argued that the claim as reflected by the Curator is therefore not justified and it should not be paid by the LPFF. According to him these were the only two matters raised in the report of the Curator. He further submits that the Applicant is approaching the court in order to prevent him from practicing when nothing is prejudicial to the Applicant.

[14] The 1st Respondent points out on the other hand that he has been in practice for 10 months beyond the lapse of the Rule Nisi and any further

continued suspension will be detrimental to his practice. The books and files were released to him not because of his demand, but because the Rule Nisi lapsed, post that, there was no reason for the Applicant to continue holding his books. He was now seeking a discharge of the Rule Nisi. He argued that there is also no further reason for Applicant to refuse to furnish him with a Fidelity Fund Certificate.

[15] On the issue of having settled the debt owing to Mr Molise and an allegation that it arose as a result of an erroneous payment made,

which became a debt against the practice, the court was referred to a letter where the 1st Respondent apologized for having taken the money for his personal use.

Issues

to be determined

[16] The issues to be determined are:

- (i) Considering the cause for the lapse of the rule nisi, whether the Applicant has made a case for revival of the rule nisi?
- (ii) If it did, the proper order to be made,

Legal framework

[17] Section 27 (4) of the Uniform Rules of Court on the revival of a lapsed rule nisi provides that:

“After a rule nisi has been discharged by default of appearance by the applicant, the court or a judge may revive the rule and direct that the rule so revived need not be served again.”

[18] Rule 27(4) was inserted into the rules in 1987 in order to address the issue of a lapsed rule nisi (in the absence of appearance by an applicant) which is said to be probably as a result of *Fischer v Fischer*[1]. Accordingly, the rule must have been discharged, by reason of non appearance by the Applicant.

- [19] In the case of *MV Snow Delta Serva Ship Ltd v Discount Tonnage Ltd*, [2] it was held that the court has no authority to mero motu extend the life of a lapsed order, irrespective of whether or not the relief sought is depended on the existence of the rule nisi.
- [20] In this matter the rule nisi was simply not enrolled for hearing on the return date due to the Applicant's attorney's non compliance with the Rules and the Court's Directive. As a result neither the rule nisi nor the matter was postponed to any particular date or dealt with. The rule nisi therefore lapsed due to the attorney's failure to enroll the matter for hearing.
- [21] In this court there is a directives that sets out the procedure to be followed in terms of which dates for hearings are obtained and matters enrolled either provisionally or finally through the designated Registrars. The procedures on rule nisi and Opposed Motion are set out in the Court's Consolidated Directive 2 of 2022, issued 08 July 2022 at paragraphs 130 – 133.
- [22] The Directive on paragraph 130 referred to provides for enrolment of Opposed Matters on return date and reads:
- ‘a notice for a hearing or provisional date containing the correct case information, eg, case number and parties details must be done per Rules of court only on court dates and between the hours of 9:00 to 15:00. A request for a hearing date or provisional date is done by uploading a properly completed notice of set down with a blank space for a date and by specifying the case type where “other” is selected. Therefore only the relevant Registrar Office Caselines profile must be invited to the electronic file to the case ...
- [23] Paragraph 132 On request for return dates provides that on:
- 132.1 “Practitioners should undertake their requests for return dates, in particular return dates in Rule Nisi Applications, in the same format as directed in paragraph 130 hereof and prior to the hearing of the matter in court.
- [24] Paragraph 132.3 provides that:
- “The Return Date obtained as described in paragraph 130 hereof must be confirmed in the same manner and form as a provisional date*
- application in order for a matter to be added to the provisional roll and the date to be entered by the Registrar's office to the file on case line. Failure to attend to provisional enrolment roll will result in the return date being forfeited.
- [25] Paragraph 133 of the Directives provides that:
- “Compliance with paragraphs 130-132 is mandatory to ensure the successful enrolment of case line matter on the Final enrollment.”*
- [26] Consequently on non-compliance, the matter will not be enrolled for hearing on the return date as the date would have been forfeited and therefore the rule nisi not dealt with, either by being extended or discharged whereupon it will automatically lapse.[3]

[27] The rule would have been discharged by default of appearance if the matter was enrolled for hearing on the date that has been furnished

as a return date. However as the matter was not before court, the Applicant's appearance would not have been recognised anyway.

The Applicant was as a result not in default of appearance as envisaged by the provisions of Rule 27 (4). In that instance it would

seem the provisions of Rule 27 (4) cannot be invoked.

[28] On the lapse of the rule nisi, the Respondent is discharged from the duty of compliance with the terms of the rule nisi[4]- which is to come and show cause why the terms of the rule nisi should not be confirmed. The position that prevailed prior the order will then remain.

[29] Similarly if on the return date, there was no order of court dealing with the life of the rule nisi, nor a postponement of the matter, the rule then lapses and consequently the umbrella of protection afforded to the Applicant by the rule falls away, leading to the discharge of the duty of compliance on the 1st Respondent post the lapse of the rule.

[30] It is however noteworthy that "The rules are for the Court and not vice versa and in context, the purpose of Rule 27(4) was to lessen the burden on an Applicant whose rule was discharged due to non-appearance.[5] Courts are however deemed to have inherent jurisdiction to grant relief should insistence on exact compliance with the Rules cause injustice- though exercised sparingly.[6] They are to be interpreted and applied in a spirit that will facilitate the work of the Courts and enable litigants to resolve

their differences in a speedy and inexpensive manner.[7]

[31] Harms : Civil Procedure in the Supreme Court, LexisNexis provides that: "B27.9 Revival of rule nisi- If a rule nisi is discharged the court is in principle functus officio and a new application would be necessary for the same order. The object of the sub-rule is to lessen the burden on an applicant whose rule was discharged due to his failure to appear on the return date. The sub-rule does not disclose an intention to override or detract from the rights of other or third parties, and before the rule can be revived it is necessary to determine what the effect of the revival would be. A rule which lapsed because of the fulfilment of a resolute condition, cannot be revived."

[32] If a rule nisi is such as to be revived, once discharged by default, the Court may so rule and direct that it need not again be served. For that reason revival will only occur where there is no possible prejudice. Put differently if the interests of the parties may be affected, the rule is unlikely to be revived[8]. Once that interim order is discharged, the status quo cannot be revived unless it can be shown that there will be no prejudice suffered by the affected party.

[33] I have to consider whether the failure to enrol the matter, hence the lapse of the rule nisi would result in an injustice if or unless the rule nisi is revived, that is to determine what effect the revival of the rule nisi would have to the parties .

[34] In S & U TV Services (Pty) Ltd: In re S & U TV Services (Pty) Ltd (in provisional liquidation) [9] the Court held that:

“With no contrary indication gained from the said factors or from any other source, I conclude that Rule 27(4) discloses no intent to override or detract from rights or interests of a litigious opponent or of third parties. Neither does it diminish the need to care for such interests. The application of Rule 27(4) must therefore be strongly influenced by the particular instance before the Court. Crucial to the said approach would be to determine what effect the revival of the rule nisi would have. Counsel suggested that the effect would be the same as if the rule had not been discharged on 6 January. This is what the Rule intended.”

[35] In Nzwalo Investment (Pty) Ltd v Infoguardian (Pty) Ltd[10] it was stated that:

“14 An interim or provisional order is different. The order has specified legal consequences beyond mere notice of the prospect of final relief being granted.

15 Often a rule nisi and an interim interdict are issued in the same order at the same time, but that does not mean they are the same thing. When a rule nisi is coupled with an interim interdict, the order sought to be confirmed on the return day will have interim effect until the return day. If the return day passes then both the rule and the interdict expire.”

[36] In VM the court also referred to the matter of the National Director of Public Prosecutions v Walsh & Others[11] where the court provided that a rule nisi order is an unusual indulgence to the Applicant, as it permits the Applicant to exceptionally condemn the unheard Respondents in their absence. Such practice goes against the general grain of fairness in the judicial process and it is for this reason that orders of this nature should be strictly temporarily and be for a fixed limited duration.

[37] Although the intention is to have to maintain the status as at time of discharge of the rule nisi, conversely in casu there has been developments since the rule was discharged. According to the Applicant a claim has in the mean time been lodged with the LPFF and the Mosili matter still pending. The 1st Respondent has alleged that in the Mosili matter the money has in the interim been paid in full, the matter settled and the complaint

withdrawn. A settlement agreement confirming such allegations is attached to the Affidavit. Furthermore the Respondent argued that

there is no claim that should lie with the LPFF as the monies in the alleged claim which were paid into the 2nd Respondent's trust account were duly distributed as intended and instructed. The Rule 27 (4) does not mention a 'new' rule which is then or later confirmed.

[38] The Applicant has also alleged that the 1st Respondent has put the creditors at risk by demanding the books back whilst he does not have a Fidelity Fund Certificate. The allegations

relate to post the lapse of the rule nisi. When the rule nisi lapsed, the umbrella of protection afforded to the Applicant by the rule fell away, leading to the discharge of the Respondent from the duty of compliance with the interim interdict. The importance and seriousness of the situation markedly discernible from the interim order, the prejudice to the parties is obvious. The situation has been extended beyond a reasonable period of existence as a result of neglect or obvious ignorance of the rules by the attorney.

[39] A rule nisi is primarily an interim order of the court and it has no independent existence but is conditional upon confirmation or discharge by the court. In terms of our common law an interim or provisional order coupled with a rule nisi is an order to which a fixed period of validity has been assigned. Once that period of validity has expired and is not renewed by an order of court, the original order automatically lapses[12]

[40] The rule nisi order lapsed, which resulted in the duty of compliance with the rule nisi's interim order also falling away.[13] Now the effect of the revival is to put the matter where it was on 15 November 2022 notwithstanding the developments after the lapse of the rule nisi.

[41] In *S & U TV Services supra*, [14] the court refused an application for the revival of a provisional order of winding up of a company where it was brought three weeks

after the discharge of the provisional order by reason of there being no appearance on the return day on behalf of the applicant. The court took into account the probability that, because of the lapse of three weeks, matters were no longer *res integra* in that it was possible that Respondents in the application may have heard of the discharge and acted accordingly.

[42] I must point out that in *casu* the Application for revival is being heard a year and two months after the rule nisi had lapsed. The 1st Respondent has been in possession of the files and control of his trust account since November 2022. Any risk prevailing has been there for the past 12 months.

[43] Under the circumstances a new application would be necessary so as to grant the parties an opportunity to deal with new developments.

Consequently the Application should be dismissed and the costs to follow the cause.

[44] In the result the following order is made:

1. The Application is dismissed with costs.

N V KHUMALO

JUDGE OF THE HIGH COURT GAUTENG, PRETORIA

For the Applicant: Adv Mteto

Instructed by: RENQE FY INC ATTORNEYS law@renqe.co.za; feziwe@renqe.co.za
tessa@renqe.co.za

For the Respondent: Adv Majenge

Instructed by: T B MTHOLO ATTORNEYS C/O MABUNDA ATTORNEYS
mtholobernette@gmail.com morgan@ksmattorneys.co.za

- [1] Fisher v Fisher 1965 (4) SA 644 (W)
- [2] 2000(4) SA 746(SCA)
- [3] Supra et 1 para
- [4] National Director of Public Prosecutions v Walsh & Others 2009 (1) SACR 603 T [24] and [25],
- [5] Manton v Croucamp NO and Others 2001 (4) SA 374 (W) 380I-381J
- [6] Herbstein & Van Winsen, The Civil Practice of the High Courts, Fifth Edition, Volume 1 page 30
- [7] Herbstein (supra) 30/31.
- [8] Herbstein (supra) 30/31
- [9] 1990
- (4) SA 88 (w) at 90H - J
- [10] Case No:6950/2020
- [11] 5201/07 {2008} ZAGHC 398 (19 November 2008)- SAFLII
- [12] Fisher supra
- [13] VM vs ZM CASE NO: 1421/2019 13 Sept 2020 ZAECGHC/2020/117 [12].
- [14] See footnote 9.

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