

SOUTH AFRICA / JUDGMENT

South African Legal Practice Council v Ntsie (52311/2019) [2020] ZAGPPHC 531 (22 August 2020)

[2020] ZAGPPHC 531

COURT

North Gauteng High Court, Pretoria

BEFORE

D S Fourie, H S Toni

CASE / FILE NUMBER

52311/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

28/8/20

CASE

NO: 52311/2019

In

the matter between:

SOUTH

AFRICAN LEGAL PRACTICE COUNCIL

Applicant

and

THABISO

JEREMIAH NTSIE

Respondent

JUDGMENT

D S FOURIE, J:

- [1] This is an application in terms of section 44(1) of the Legal Practice Act for an order that the respondent be struck from the Roll of Attorneys (Legal Practitioners). The application is opposed by the respondent.
- [2] The respondent was admitted as an attorney on 9 December 2005 and as a conveyancer on 20 November 2006. He is practising as a single practitioner for his own account and has done so since 14 March 2013 under the style of T J Ntsie Attorneys.
- [3] The application was served on the respondent personally on 26 July 2019. The respondent filed his notice of opposition and answering affidavit on 21 August 2019. The applicant served its replying affidavit and a supplementary founding affidavit on 17 September 2019. The applicant served a further supplementary founding affidavit on 22 November 2019.
- [4] A few days before the date of hearing the respondent filed an application in terms of Rule 6(11). In this application the respondent applies for an order striking out the applicant's supplementary founding affidavit filed on 17 September 2019 and also the further supplementary founding affidavit filed on 22 November 2019. The relief sought in the alternative is that in the event the applicant is granted condonation for the filing of the said supplementary founding affidavits, the respondent then would like to apply for leave to file his additional answering affidavit in response to the further supplementary founding affidavits of the applicant.
- [5] In opposing the respondent's application it was submitted on behalf of the applicant that this application is no more than a continuation of the respondent's obstructive conduct in the proceedings and his attempts to avoid accounting to the Court for his conduct as he had sufficient time, since the filing of the supplementary founding affidavits, to file an answer thereto.
- [6] I take into account that the application launched by the applicant does not constitute ordinary civil proceedings but are sui generis in nature. This means that the applicant's role in bringing such proceedings is not that of an ordinary adversarial litigant, but is rather to put evidence before Court regarding the alleged misconduct of a legal practitioner. The purpose of filing the further founding affidavits is to put evidence before Court regarding such conduct of the respondent. It is therefore not necessary, in my view, for the applicant to apply for condonation as suggested by the respondent. The application in terms of Rule 6(11) can therefore not succeed, save for considering whether the respondent should be granted the opportunity to file a further answering affidavit.

[7] Taking into account the further allegations which have been set out in the supplementary founding affidavits and the fact that the respondent has not yet filed an answer thereto, the Court postulated three possibilities to the parties, namely:

(a) the matter should be considered without taking into account the application in terms of Rule 6(11), alternatively to dismiss the

application without the opportunity being granted to the respondent to file a further affidavit;

(b) granting the respondent the opportunity to file a further answering affidavit, and a reply thereto by the applicant, subject to an interim order of suspension;

(c) granting the respondent the opportunity to file a further answering affidavit, and a reply thereto by the applicant, without a suspension order, in which event the matter should be postponed to a specific date, as soon as possible, to be arranged with the Registrar .

[8] Both parties were given the opportunity to make further submissions regarding which procedure the Court should follow. Counsel for the applicant submitted that the first option would be an appropriate cause of action to follow. Counsel for the respondent submitted that the last option should be fair and reasonable .

[9] When deciding which is the best cause of action to follow the Court must take into account all the relevant facts and circumstances. In the main application the applicant applies that the respondent be struck off the Roll of Attorneys. As already pointed out above this application is founded upon a founding affidavit and two supplementary founding affidavits to which the respondent has not yet filed an answer.

[10] This is a serious and important matter for both parties. Although the respondent had sufficient time to file such a further answering affidavit, it has become clear that he now applies for such an opportunity (albeit in the alternative) and I am of the view that he should be granted leave to do so. This will give him the opportunity to put his case before Court regarding the allegations contained in the first and second supplementary founding affidavits. The fact that he has waited such a long time before realising that he should be afforded the opportunity to file a further answering affidavit, is a

factor that may be taken into account when the wasted costs are considered. I am therefore of the view that the main application

should be postponed sine die to enable the respondent to file a further answering affidavit.

[11] That brings me to the question whether there should be an interim suspension order pending finalisation of the main application or not. In the first founding affidavit dated 12 June 2019 it is alleged that the application finds its foundation in the respondent's continued practice as an attorney without being in possession of a Fidelity Fund Certificate, numerous complaints submitted to the erstwhile Law Society regarding, inter alia, the respondent's delayed payment of trust funds, his failure to account for trust funds, his misappropriation of trust funds and the reports from two inspections conducted into the respondent's practice

affairs.

[12] It is not necessary to deal with each of these allegations or to decide the points in limine which have been raised by the respondent. These issues can be debated and decided when the main application, together with the respondent's further answering affidavit, are before Court. However, it is necessary to point out some of the more serious allegations and the respondent's answer thereto for purposes only to decide whether there should be an interim suspension order or not.

[13] It is alleged in the first founding affidavit that the respondent is not in possession of and has not been issued with a Fidelity Fund Certificate for 2019. According to the applicant he nevertheless continued practising as an attorney without such certificate as from 1 January 2019. The answer to these allegations is the following:

"I take note of the allegations contained herein and vehemently dispute same, as if specifically traversed."

[14] It is also alleged by the applicant that according to an inspection report it appears that the financial transactions of the respondent's firm were not properly recorded in the accounting records in order to reflect the firm's trust position accurately and the first respondent also concealed the existence of trust deficits in his bookkeeping and the trust debit balances by way of journal entries. The answer to these allegations is the following:

[15] It is also pointed out in the founding affidavit that as at 30 April 2015 a comparison between the firm's list of trust creditors and the available trust funds caused the investigator to conclude that there was no trust deficit in the respondent's bookkeeping. However, it is submitted that in view of the other findings referred to above, the trust position cannot be considered to be reliable. The applicant furthermore relies on the conclusion that the respondent's accounting records have not been properly kept and are not an accurate reflection of the firm's trust account transactions. These allegations are likewise denied by the respondent.

[16] In the applicant's supplementary founding affidavit served on 17 September 2019 reference is made to additional complaints received from clients of the respondent. According to the complaint filed by B R Magagula the respondent was instructed to attend to the transfer of certain immovable property. The amount of R10,000.00 was paid to the firm in respect of transfer costs. It is alleged that the respondent failed to execute the instruction and the whereabouts of the amount of R10,000.00 are unknown. Similar other complaints are also referred to in this affidavit.

[17] In its second supplementary founding affidavit served on 22 November 2019 the applicant refers to further complaints against the respondent. It is alleged that in connection with a registration of transfer of certain immovable property "the respondent, with the assistance of an employee of the Municipality, misappropriated the balance of the proceeds in an amount of R440,000.00". According to the applicant these allegations provide additional

evidence that the respondent has made himself guilty of unprofessional and dishonourable conduct.

- [18] I take into account that the respondent has not yet filed an answering affidavit to the allegations contained in the supplementary founding affidavits. He may have an answer to these allegations. However, it has been pointed out by counsel for the applicant that the respondent's answering affidavit to the founding affidavit is a bare denial to the substantive allegations made against him. Taking into account these considerations, I am of the view that a prima facie case has been made out to prevent the respondent from practising as an attorney pending finalisation of the main application. In this regard it should be pointed out that no final conclusion has been reached or final decision has been taken. The purpose of such an order is only to have interim effect pending finalisation of the main application.

ORDER

In the result I grant the following order ("first order"):

1. The application is postponed sine die;
2. The supplementary founding affidavit (17 September 2019) and further supplementary founding affidavit (22 November 2019) shall stand as part of the set of affidavits filed to date hereof in the main application ;
3. The respondent shall be entitled to file an answering affidavit to the applicant's supplementary founding affidavit (17 September 2019) as well as its further supplementary founding affidavit (22 November 2019) within 21 days from date of service of this order;
4. The applicant shall be entitled to file a replying affidavit to the respondent's further answering affidavit within 14 days after date of service of the further answering affidavit;
5. Pending finalisation of the main application the respondent shall be suspended from practising as a legal practitioner (attorney and/or conveyancer). The further order attached hereto and marked "X" shall apply in its entirety to the respondent and his interim suspension pending finalisation of the main application;
6. The wasted costs occasioned by this postponement, including that of the respondent's rule 6(11) application, shall be paid by the respondent.

D S FOURIE

JUDGE OF THE HIGH COURT

PRETORIA 22/8/20

I agree:

H S TONI

ACTING JUDGE OF THE HIGH COURT

PRETORIA

ATTORNEYS FOR THE APPLICANT: RW Attorneys Inc

COUNSEL FOR THE APPLICANT:

Mr L Groome (079 346 7203)

ATTORNEYS FOR THE RESPONDENT: Ahmed T Shabang Inc Attorneys

COUNSEL FOR THE RESPONDENT: Adv Mathaphuna (082 300 6739)

“X”

28/2/20

PRETORIA ON THIS 28TH DAY OF JUNE 2020

BEFORE THE HONOURABLE JUSTICE FOURIE

BEFORE THE HONOURABLE ACTING JUSTICE TONI

In the matter between:

SOUTH AFRICAN LEGAL PRACTICE COUNCIL

Applicant

THABISO JEREMIAH NTSIE

Respondent

FURTHER ORDER

Having heard counsel for the applicant and respondent and having read the papers filed of record:

It is ordered that:

1. This order shall operate in addition to the first order granted by Fourie J and Tony AJ dated 28 August 2020;
2. THABISO JEREMIAH NTSIE (respondent) is suspended from practising as a legal practitioner (attorney and/or conveyancer) pending finalisation of the application to remove his name from the roll of legal practitioners.
3. The respondent immediately surrenders and delivers to the Registrar of this Court his certificate of enrolment as an attorney and conveyancer.

4. In the event of the respondent failing to comply with the terms of this order detailed in the previous paragraph within two (2) weeks from the date of this order, the Sheriff of the district in which the certificate is, be authorised and directed to take possession of the certificate and to hand it to the Registrar of this honourable Court.
5. The respondent be prohibited from handling or operating on his trust accounts as detailed in paragraph 6 hereof.
6. Johan van Staden, the Head: Risk and Compliance of the applicant or any person nominated by him, be appointed as curator bonis (curator) to administer and control the trust accounts of the respondent, including accounts relating to insolvent and deceased estates and any deceased estate and any estate under curatorship connected with respondent's practice as attorney and including, also, the separate banking accounts opened and kept by respondent at a bank in the Republic of South Africa in terms of section 86(1) of the Legal Practice Act ("LPA") and/or any separate savings or interest-bearing accounts as contemplated by section 86(3) and/or section 86(4), in which monies from such trust banking accounts have been invested by virtue of the provisions of the said sub- sections or in which monies in any manner have been deposited or credited (the said accounts being hereafter referred to as the trust accounts), with the following powers and duties:

6.1 immediately to take possession of the respondent's accounting records, records, files and documents as referred to in paragraph 7 and subject to the approval of the board of control of the legal practitioners' fidelity fund (hereinafter referred to as "the fund") to sign all forms and generally to operate upon the trust account(s), but only to such extent and for such purpose as may be necessary to bring to completion current transactions in which the first respondent was acting at the date of this order;

6.2 subject to the approval and control of the board of control of the fund and where monies had been paid incorrectly and unlawfully from the undermentioned trust accounts, to recover and receive and, if necessary in the interests of persons having lawful claims upon the trust account(s) and/or against the respondent in respect of monies held, received and/or invested by the respondent in terms of section 86(1) and/or section 86(3) and/or section 86(4) of the LPA (hereinafter referred to as "trust monies"), to take any legal proceedings which may be necessary for the recovery of money which may be due to such persons in respect of incomplete

transactions, if any, in which the respondent was and may still have been concerned and to receive such monies and to pay the same to the credit of the trust account(s);

6.3 to ascertain from the respondent's accounting records the names of all persons on whose account the respondent appears to hold or to have received trust monies (hereinafter referred to as "trust creditors") and to call upon respondent to furnish him, within 30 (thirty) days of the date of service of this order or such further period as he may agree to in writing, with the names, addresses and amounts due to all trust creditors;

6.4 to call upon such trust creditors to furnish such proof, information and/or affidavits as he may require to enable him, acting in

consultation with, and subject to the requirements of, the board of control of the fund, to determine whether any such trust creditor has a claim in respect of monies in the trust account(s) of the respondent and, if so, the amount of such claim;

6.5 to admit or reject, in whole or in part, subject to the approval of the board of control of the fund, the claims of any such trust creditor or creditors, without prejudice to such trust creditor's or creditors' right of access to the civil courts;

6.6 having determined the amounts which he considers are lawfully due to trust creditors, to pay such claims in full but subject always to the approval of the board of control of the fund;

6.7 in the event of there being any surplus in the trust account(s) of the respondent after payment of the admitted claims of all trust

creditors in full, to utilise such surplus to settle or reduce (as the case may be), firstly, any claim of the fund in terms of section 86(5) of the LPA in respect of any interest therein referred to and, secondly, without prejudice to the rights of the creditors of the respondent, the costs, fees and expenses referred to in paragraph 13 of this order, or such portion thereof as has not already been separately paid by the respondent to applicant, and, if there is any balance left after payment in full of all such claims, costs, fees and expenses, to pay such balance, subject to the approval of the board of control of the fund, to the respondent, if he is solvent, or, if respondent is insolvent, to the trustee(s) of the respondent's insolvent estate;

6.8 in the event of there being insufficient trust monies in the trust banking account(s) of the respondent, in accordance with the

available documentation and information, to pay in full the claims of trust creditors who have lodged claims for repayment and whose claims have been approved, to distribute the credit balance(s) which may be available in the trust banking account(s) amongst the trust creditors alternatively to pay the balance to the fund;

6.9 subject to the approval of the chairman of the board of control of the fund, to appoint nominees or representatives and/or consult with and/or engage the services of attorneys, counsel, accountants and/or any other persons, where considered necessary, to assist him in carrying out his duties as curator; and

6.10 to render from time to time, as curator, returns to the board of control of the fund showing how the trust account(s) of the respondent

has/have been dealt with, until such time as the board notifies him that he may regard his duties as curator as terminated.

7. The respondent immediately delivers his accounting records, records, files and documents containing particulars and information relating to:

- 7.1 any monies received, held or paid by the respondent for or on account of any person while practising as an attorney;
- 7.2 any monies invested by the respondent in terms of section 86(3) and/or section 86(4) of the LPA;
- 7.3 any interest on monies so invested which was paid over or credited to the respondent;
- 7.4 any estate of a deceased person or an insolvent estate or an estate under curatorship administered by the respondent , whether as executor or trustee or curator or on behalf of the executor, trustee or curator;
- 7.5 any insolvent estate administered by the respondent as trustee or on behalf of the trustee in terms of the Insolvency Act, No 24 of 1936;
- 7.6 any trust administered by the respondent as trustee or on behalf of the trustee in terms of the Trust Properties Control Act, No 57 of 1988;
- 7.7 any company liquidated in terms of the Companies Act, No 61 of 1973, administered by the respondent as or on behalf of the liquidator;
- 7.8 any close corporation liquidated in terms of the Close Corporation Act 69 of 1984 administered by the respondent as or on the behalf of the liquidator; and
- 7.9 the respondent's practice as an attorney of this honourable Court, to the curator appointed in terms of paragraph 6 hereof, provided that, as far as such accounting records, records, files and documents are concerned, the respondent shall be entitled to have reasonable access to them but always subject to the supervision of such curator or his nominee.
8. Should the respondent fail to comply with the provisions of the preceding paragraph of this order on service thereof upon him or after a return by the person entrusted with the service thereof that he has been unable to effect service thereof on the respondent (as the case may be), the Sheriff for the district in which such accounting records , records, files and documents are, be empowered and directed to search for and to take possession thereof wherever they may be and to deliver them to such curator.
9. Respondent be and is hereby removed from office as -
- 9.1 executor of any estate of which respondent has been appointed in terms of section 54(1)(a)(v) of the Administration of Estates Act, No 66 of 1965 or the estate of any other person referred to in section 72(1);
- 9.2 curator or guardian of any minor or other person's property in terms of section 72(1) read with section 54(1)(a)(v) and section 85 of the Administration of Estates Act, No 66 of 1965;
- 9.3 trustee of any insolvent estate in terms of section 59 of the Insolvency Act, No 24 of 1936;

9.4 liquidator of any company in terms of section 379(2) read with section 379(e) of the Companies Act, No 61 of 1973;

9.5 trustee of any trust in terms of section 20(1) of the Trust Property Control Act, No 57 of 1988;

9.6 liquidator of any close corporation appointed in terms of section 74 of the Close Corporation Act, No 69 of 1984; and

9.7 administrator appointed in terms of section 74 of the Magistrates' Court Act, No 32 of 1944.

10. The curator shall be entitled to:

10.1 hand over to the persons entitled thereto all such records, files and documents provided that a satisfactory written undertaking has been received from such persons to pay any amount, either determined on taxation or by agreement, in respect of fees and disbursements due to the firm;

10.2 require from the persons referred to in paragraph 10.1 to provide any such documentation or information which he may consider relevant in respect of a claim or possible or anticipated claim, against him and/or respondent and/or respondent's clients and/or fund in respect of money and/or other property entrusted to the respondent provided that any person entitled thereto shall be granted reasonable access thereto and shall be permitted to make copies thereof;

10.3 publish this order or an abridged version thereof in any newspaper he considers appropriate.

11. If there are any trust funds available the respondent shall within 6 (six) months after having been requested to do so by the curator, or within such longer period as the curator may agree to in writing, shall satisfy the curator, by means of the submission of taxed bills of costs or otherwise, of the amount of fees and disbursements due to him (respondent) in respect of his former practice, and should he fail to do so, he shall not be entitled to recover such fees and disbursements from the curator without prejudice, however, to such rights (if any) as he may have against the trust creditor(s) concerned for payment or recovery thereof.

12. Subject to the order for costs referred to in paragraph 6 of the first order, all other costs relating to the main application are reserved for consideration in the adjudication of the main application.

ATTORNEYS FOR THE APPLICANT: RW Attorneys Inc

COUNSEL FOR THE APPLICANT:

Mr L Groome (079 346 7203)

ATTORNEYS FOR THE RESPONDENT: Ahmed T Shabang Inc Attorneys

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