

SOUTH AFRICA / JUDGMENT

South African Legal Practice Council v Phooka (75966/2018) [2020] ZAGPPHC 515 (31 July 2020) [2020] ZAGPPHC 515

COURT

North Gauteng High Court, Pretoria

BEFORE

G. Ally, TAN Makhubele

CASE / FILE NUMBER

75966/2018

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IN

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

CASE

NO: 75966/2018

In

the matter between:

SOUTH
AFRICAN LEGAL
PRACTICE
COUNCIL
Applicant
and

PHOOKO:

NGWAKO AURIEL
Respondent

JUDGMENT

ALLY AJ

INTRODUCTION

[1]

This is an application for the removal of the Respondent from the roll of attorneys of this Court.

[2]

The Respondent was suspended from practising as attorney on 29 August 2019 pending the finalisation of the application for the removal of his name from the roll of legal practitioners and further relief was granted on the same day which included the filing of a supplementary affidavit by 30 October 2019 and a replying affidavit by the Applicant by 29 November 2019.

[3]

At the outset it should be stated that the Respondent did not avail himself of the opportunity to file a supplementary affidavit.

[4]

The Applicant filed its replying affidavit dealing with the answering affidavit of the Respondent. The Applicant had also requested the Court for Condonation for the late filing of same. On a consideration of same we granted the said condonation.

[5]

The applicant is South Africa Legal Practice Council, the successor to the Law Society of the Northern Provinces, a statutory body established in terms of section 4 of the Legal Practice Act, No. 28 of 2014 (LPA) with amongst others, powers to continue actions initiated in terms of the repealed Attorneys Act, No 53 of 1979 and various other statutes that regulated the profession of attorneys before they were repealed by the LPA.

[6]

The Respondent is NGWAKO AURIEL PHOOKO and was admitted and enrolled to practice as an attorney of this Court on 3 February 2000.

[7]

He practiced as a professional assistant at the firm Rabin, Van der Berg & Pelkowitz Incorporated whereafter he spent a period of time employed in the advisory division of Brait, a merchant bank.

[8]

In March 2004 the Respondent practised for his own account under the name and style of Mashaakgomo Incorporated Attorneys until he was interdicted from so practising on 15 October 2015.

[9]

The Order of 15 October 2015 [which numbering might differ because two paragraphs were deleted], was in the following terms:

9.1. Respondent is interdicted from practising as an attorney of this Court, for his own account.

9.2. Respondent be prohibited from handling or operating on his trust accounts as detailed hereunder;

9.3. That Johan van Staden, the head: members affairs of applicant or any person nominated by him, be appointed as curator bonis (curator) to administer and control the trust accounts of respondent, including accounts relating to insolvent and deceased estates and any deceased estate and any estate under curatorship connected with respondent's practice as an attorney and including, also, the separate banking accounts opened and kept by respondent at a bank in the Republic of South African terms of section 78(1) of Act No 53 of 1979 and/or any separate savings or interest bearing accounts as contemplated by section 78(2) and/or section 78(2A) of Act No 53 of 1979, in which monies from such trust banking accounts have been invested monies in any manner have been deposited or credited 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:

9.3.1. immediately to take possession of respondent's accounting records, records, files and documents as referred to in paragraph 6 and subject to the approval of the board of control of the attorneys 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 purposes as may be necessary to bring to completion current transactions in which respondent was acting at the date of this order;

9.3.2. subject to the approval and control of the board of control of the fund and where monies had been paid incorrectly or 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 respondent in respect of monies held, received and/or invested by respondent in terms of section 78(1) and/or section 78(2) and/or section 78(2A) of Act No 53 of 1979 (hereinafter referred to as the 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 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);

9.3.3. to ascertain from respondent's accounting records the names of all persons on whose account 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 in writing, with the names, addresses and amounts due to all trust creditors;

9.3.4. to call upon such trust account 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 respondent and. If so, the amount of such claim:

9.3.5. 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;

9.3.6. 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;

9.3.7. in the event of there being any surplus in the trust account(s) of 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 78(3) of Act No 53 of 1979 in respect of any interest therein referred to and, secondly, without prejudice to the rights of the creditors of respondent, the costs, fees and expenses referred to in paragraph 8 of this order, or such portion thereof as

has not already been separately paid by 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 respondent, if he is solvent, or, of respondent is insolvent, to the trustee(s) of respondent's insolvent estate;

9.3.8. in the event of there being insufficient trust monies in the trust banking account(s) of 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 to pay the balance to the Attorneys Fidelity Fund;

9.3.9. 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, were considered necessary, to assist him in carrying out his duties as curator; and

9.3.10. to render from time to time, as curator, returns to the board of control of the fund showing how the trust account(s) of respondent has/have been dealt with, until such time as the board notifies him that [s] he may regard his duties as curator as terminated.

9.4. Respondent immediately delivers his accounting records, records, files and documents containing particulars and information relating to:

9.4.1. any monies received, held or paid by respondent for or on account of any person while practising as an attorney;

9.4.2. any monies invested by respondent in terms of section 78(2) and/or section 78(2A) of Act No 53 of 1979;

9.4.3. any interest on monies so invested which was paid over or credited to respondent;

9.4.4. any estate of a deceased person or an insolvent estate or an estate under curatorship administered by respondent, whether as executor or trustee or curator or on behalf of the executor, trustee or curator;

9.4.5. any insolvent estate administered by respondent as trustee or on behalf of the trustee in terms of the Insolvency Act No 24 of 1936;

9.4.6. any trust administered by respondent as trustee or on behalf of the trustee in terms of the Trust Properties Control Act No 57 of 1988;

9.4.7. any company liquidated in terms of the Companies Act No 61 of 1973, administered by respondent as or on behalf of the liquidator;

9.4.8. any close corporation liquidated in terms of the Close Corporations Act No 69 of 1984, administered by respondent as or on behalf of the liquidator; and

9.4.9. respondent's practice as an attorney of this Court, to the curator appointed in terms of paragraph 5.3[my numbering] hereof, provided that, as far as such accounting records, records, files and documents are concerned, respondent shall be entitled to have reasonable access to them but always subject to the supervision of such curator or his nominee.

9.5. should 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 (s)he has been unable to effect service thereof on 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 take possession thereof whenever they may be and to deliver them to such curator.

9.6. That the curator shall be entitled to:

9.6.1. 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;

9.6.2. require from the persons referred to in paragraph 5.6.1. to provide any such documentation or information which she 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 respondent provided that any person entitled thereto shall be granted reasonable access thereto and shall be permitted to make copies thereof;

9.6.3. publish this order or an abridged version thereof in any newspaper he considers appropriate; and

9.6.4. wind-up the respondent's practice.

9.7. that the Respondent be and is hereby removed from office as:

9.7.1. executor of any estate of which the 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);

0cm; line-height: 200%">9.7.2. 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;

9.7.3. Trustee of any insolvent estate in terms of section 59 of the Insolvency Act No 24 of 1936;

9.7.4. liquidator of any company in terms of section 379(2) read with 379€ of the Companies Act No 61 of 1973 and read together with the provisions of the Companies Act No 71 of 2008;

9.7.5. Trustee of any trust in terms of section 20(1) of the Trust Property Control Act No 57 of 1988;

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

9.7.7. administrator appointed in terms of section 74 of the Magistrates Court Act No 32 of 1944;

9.8. That the Respondent be and is hereby directed:

9.8.1. to pay, in terms of section 87(2) of Act No 28 of 2014, the reasonable costs of the inspection of the accounting records of the Respondent;

9.8.2. to pay the reasonable fees of the auditor engaged by applicant;

9.8.3. to pay the reasonable fees and expenses of the curator, including traveling time;

9.8.4. to pay the reasonable fees and expenses of any person(s) consulted and/or engaged by the curator as aforesaid;

9.8.5. to pay the expenses relating the publication of this order or an abbreviated version thereof; and

9.8.6. to pay the costs of this application on an attorney-and-client scale.

9.9. That if there be 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 the fees and disbursements due to the 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;

9.10. That a certificate issued by a director of the Legal Practitioners' Fidelity Fund shall constitute prima facie proof of the curator's costs and that the Registrar be authorised to issue a writ of execution on the strength of such certificate in order to collect the curator's costs.

9.11. That in the event that the Respondent intends to continue to practice as an attorney for his own account, the Respondent shall make an application to this Court demonstrating that the infractions which brought about him being interdicted from practice as an attorney for his own account has been corrected and further demonstrating that he is a fit and proper person to be allowed to continue to practice as an attorney for his own account.

LEGAL FRAMEWORK

[10] Section 22(1)(d) of the Attorneys Act 53 of 1979 provides that any person who has been admitted and enrolled as an attorney may be struck off the roll of attorneys or suspended from practice on the application of a law society that has jurisdiction if in the discretion of the court that person is not a fit and proper person to continue to practice as an attorney.

[11] It is trite that the exercise of the court's discretion entails a three-stage enquiry that has been formulated by Brand JA in *Summerley v Law Society, Northern Provinces*[1] as follows:

"It has now become settled law that the application of s 22(1)(d) involves a threefold enquiry (see eg *Jasat v Natal Law Society* 2000

(3) SA 44 (SCA) para 10 at 51C-1 and *Law Society of the Cape of Good Hope v Budricks* 2003

(2) SA 11 (SCA) para 2 at 131-148). The first enquiry is aimed at determining whether the law society has established the offending conduct upon which it relies, on a balance of probabilities. The second question is whether, in the light of the misconduct thus established the attorney concerned is not a 'fit and proper person to continue to practise as an attorney'. Although this has not always been the position, s 22(1)(d) now expressly provides that the determination of the second issue requires an exercise of its discretion by the court (see eg *A v Law Society of the Cape of Good Hope* 1989 (1) SA 849(A) at 851C-E). As was pointed out by Scott JA in *Jasat* (at 51E-F), the exercise of the discretion at the second stage 'involves in reality a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, a value judgment' (see also eg *Budricks supra* at

14A). The third enquiry again requires the court to exercise discretion. At this stage the court must decide, in the exercise of its discretion, whether the person, who has been found not to be a fit and proper person to practise as an attorney, deserves the ultimate penalty of being struck from the roll or whether an order of suspension from practice will suffice."

[12]

The principles were re-iterated by Harms DP in *Law Society of the Northern Provinces v Mogami and Others*[2]

"Applications for the suspension or removal from the roll require a three-stage enquiry. First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual inquiry. Second, it must consider whether the person concerned is 'in the discretion of the Court' not a fit and proper person to continue to practise. This involves a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent is a value judgment. And third, the court must inquire whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice (*Jasat v Natal Law Society* 2000

(3) SA 44, [2000] 2 All SA 310 (SCA); *Malan and Another v Law Society of the Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216;

[2009] 1 All SA 133 (SCA) at para 10"

[13]

It is trite that the nature of the proceedings are sui generis and not criminal or civil[3] The law society and its successor, the South African Legal Practice Council, is exercising its oversight role and disciplinary powers to bring an officer of court who has misconducted himself for the court to enquire into the matter and if it finds that indeed the offending conduct has been established, to exercise its discretion as to whether such an officer should be met with the ultimate sanction of removal from the roll or be given another opportunity to correct his errors. It is for this reason that the court is expected to consider the evidence placed before it properly and where the attorney has made submissions or given answers, to consider the issues in a proper perspective.

THE FACTUAL MATRIX FORMING PART OF TRANSGRESSIONS AND
APPLICATION FOR ORDER OF 15 OCTOBER 2015

[14]

The factual background leading to the resolution by the Applicant to launch these proceedings has been deposed to by the Vice President, Mr Sandile Osborn Beauchamp.

14.1. The Respondent had failed to lodge unqualified audit reports in accordance with Rule 35.22 read with 35.23 of the Applicant's Rules for the periods February 2013 and February 2014. Failure to so lodge had the effect that Respondent could not show that he had kept and maintained his accounting records as required by the Attorneys Act and the Applicant's Rules promulgated thereunder which are to the effect that at all relevant times, sufficient monies were in his trust bank account to meet his obligations to trust creditors.

14.2. As a result of the aforementioned, the Applicant did not issue the Respondent with a Fidelity Fund Certificate for the years commencing January 2014 and January 2015 the consequence of which meant that the Respondent was not entitled to practise for reward. However, notwithstanding the fact that he was not in possession of a Fidelity Fund Certificate, the Respondent continued to practise for his own account.

14.3. The Respondent's former auditors furthermore requested the Applicant to reject the audit reports submitted on behalf of the Respondent for the periods ending February 2011 and February 2012, as same were fraudulently done by a former employee who had been dismissed who allegedly retained the firm's letterhead and fraudulently completed audit reports on behalf the Respondent.

14.4. The Respondent had failed to pay subscription fees for the year 2010 and after a disciplinary hearing which was held in absentia, the Respondent was fined RS000-00 [five thousand rand]. The fine, together with pro rata costs of the hearing and the outstanding 2010 subscription fees were to be paid on/before 31 December 2010. The Respondent failed to pay the said amount[s] on or before the 31 December 2010. The Applicant's records reflected that as at the date of the launch of the interdict on 15 October 2015, an amount of R5479- 93 was outstanding.

14.5. The Respondent furthermore failed to pay his membership fees in the total amount of R3 477-00 [three thousand four hundred and seventy-seventy rand] for the financial years 2010, 2011 and 2012.

14.6. The Curator's report identifies deficiencies in the Respondent's Trust account and that subsequent to the order of 15 October 2015, Mr Muroa had attended at the Respondent's Practice address on 26 October 2015 and found nobody present nor any Client files and accounting records as part of implementation of the said Order.

14.7. The Respondent thereafter contacted Mr Muroa indicating his awareness of the Order of 15 October 2015; that he was no longer in possession of any Client files and same were uplifted by the Clients themselves; that the firm's accounting records were kept by the firm's auditors. The Respondent had also promised to submit the accounting records once the audits were completed to no avail. Further attempts to contact the Respondent proved fruitless.

14.8. Subsequent of the Order of 15 October 2015 Applicant alleges that Respondent committed offences in contravention of the Rules of the Attorneys Profession:

14.8.1. A complainant, Ms Bulelwa Booï, gave instructions for the Respondent to attend to her divorce proceedings and to secure a maintenance order against her husband. An amount of R17 000-00 [seventeen thousand rand] was paid into the bank account of Phooko Advisory Services [Pty] Ltd. The complainant's instructions were not carried out;

14.8.2. A complainant, Mr Kawauta Sijako gave instructions to the Respondent to assist his sister in divorce proceedings against her husband and to secure a maintenance order against the husband. The complainant indicated that the instructions were not carried out and an amount of R17 000-00 had been deposited into the bank account of Phooko Advisory Services [Pty] Ltd.

EVALUATION AND ANALYSIS

[15] During argument before this Court, Respondent admitted and conceded the offences as outlined by the Applicant and concentrated on the sanction to be applied for the transgressions in contravention of the Rules of the Attorneys Profession. The concession in my view was wisely made because it is clear from the evidence that the Respondent did contravene the Rules of the Attorneys Profession as outlined by the Applicant[4] The first leg of the enquiry by the Court has thus been satisfied, namely that the Applicant has proven its case relating to the conduct of the Respondent, on a preponderance of probabilities.

[16] The second enquiry involves the assessment by the Court of whether the Respondent is a 'fit and proper person to continue to practise as an attorney'. Whilst this has not always been the position, Section 22(1)(d) now expressly provides that the determination of the second issue requires an exercise of its discretion by the Court.[5] The exercise of this discretion at the second stage involves in reality a weighing up of the conduct complained of against the conduct expected of an attorney and to this extent, a value judgment.[6]

[17]

The Respondent is an Attorney of some 20 years' experience having been admitted on 3 February 2000. An Attorney of such experience must know and should have known the consequence of an interdict against him which barred him from practising as an Attorney. It is clear from the evidence that despite the Order of 15 October 2015 coming to his attention, the Respondent nevertheless conducted himself as if he were a practising Attorney with no interdict against him.

[18]

The Respondent's 'justifications' that he was trying to get his financial house in order, demonstrates his character as a person who has no concept of his duty and obligations towards the Court and therefore cannot be said to be a 'fit and proper person' to continue practising as an Attorney.

[19]

I agree with the Applicant that Respondent's clear disregard of the abovementioned Order of 15 October 2015 amounts to contempt of Court and

is a various serious offence which needs very serious consideration. There can be no justification for the Respondent's wanton disregard of the said Order.

[20]

Having regard to the totality of the evidence relating to the conduct of the Respondent as set out by the Applicant and such conduct which constitutes a material deviation from the standards of professional conduct which is expected of a legal practitioner, I cannot but reach the conclusion that the Respondent is not a 'fit and proper person to practice as an Attorney'.

[21]

This brings me to the third requirement in proceedings of this nature, namely, whether the Respondent should be removed from the roll of attorneys or whether an order suspending him from practice would be an appropriate sanction[7].

[22]

The consideration of an appropriate sanction is a requirement on its own and the finding or conclusion that the Respondent is not a 'fit and proper person to practice as an attorney', cannot lead to an automatic sanction of removal from the roll of attorneys as opposed to a suspension from such practise for a period of time.

[23]

Before imposing the sever penalty of removing the Respondent from the roll this Court must be satisfied that the lesser sanction of suspension from practice will not achieve the court's supervisory powers over the conduct of attorneys[8].

[24]

The Respondent has contended that this Court should show mercy and rather make use of suspension from practice than the ultimate penalty of striking-off. Respondent relied heavily on the Summerley judgment supra, in arguing for a lesser punishment.

[25]

I am of the view, however, that the Summerley matter is quite different from Respondent's circumstances in that in this matter, Responder-it had made use of funds in his trust account contrary to the Rules of his profession and wittingly, intentionally and unlawfully charged a fee to Clients, Booi and Sijako in circumstances where he was not supposed nor permitted to, having been barred from doing so by the Order of 15 October 2015, made use of a bank account under the name and style of Phooko Advisory Services (Pty) Ltd to secure his legal services and practised under the name and style of Maskaakgomo Attorneys contrary to the said order. Finally the audit reports submitted by Respondent were fraudulent albeit the Respondent claiming that the Auditor was to blame. As Attorney he has an obligation to ensure that documentation submitted on his behalf is above board.

[26]

This conduct set out in paragraph 21 above, in my view shows a character of dishonesty and cunningness in disguising his name so that the unwitting would not question his entitlement to practise as an Attorney and shows a lack of integrity.

[27]

Accordingly, taking into account what has been set out above relating to the appropriate sanction, I am of the view that the Respondent should be removed from the roll of attorneys as opposed to a penalty of suspension.

Conclusion

[28]

Having found that the Applicant has established the offending conduct on a balance of probabilities and that the Respondent is not a 'fit and proper person to practise as an attorney', in the result I am of the view that the Respondent be removed from the roll of attorneys.

[29]

Accordingly an order in terms of the draft order marked X is made an order of Court.

G. Ally AJ

Acting Judge of the High Court

I agree, and it is so ordered

TAN Makhubele J

Judge of the High Court

APPEARANCES

APPLICANT:

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Heard on

25 February 2020

Delivered on:

31 July 2020

- [1] 2006 (5) SA 613 (SCA) at paragraph 2
- [2] 2010 (1) SA 186 (SCA) at para 4
- [3] Hepple v Law Society of the Northern Provinces 2014 SCA para 9
- [4] See pages 024 - 035 of the Appeal record
- [5] A v Law Society of the Cape of Good Hope 1989 (1) SA 849 @ 851 C- E
- [6] Jasat v Natal Law Society 2000 (3) SA 44 SCA para 10 @ 51C -1 Law Society of the Cape of Good Hope v Budricks 2003 (2) SA 11SCA @ 14A
- [7] Summerley v The Law Society of the Northern Provinces supra
- [8] Summerley supra @ para 19

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