

SOUTH AFRICA / JUDGMENT

# Law Society of the Northern Provinces v Kyle (57490/2013) [2014] ZAGPPHC 989 (17 December 2014)

**[2014] ZAGPPHC 989****COURT**

North Gauteng High Court, Pretoria

**BEFORE**

W Louw, H Hughes

**CASE / FILE NUMBER**

57490/2013

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**Source record****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****Case Number:**

57490/2013

In the matter

**between:**THE LAW SOCIETY  
OF THE  
NORTHERN  
PROVINCES.....

APPLICANT

and

FREDERICK  
KYLE.....

RESPONDENT

T

**Coram:**J  
W LOUW J et  
HUGHES  
J

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**JUDGMENT**

Delivered on: 17 December 2014

Heard on: 10 October 2014

HUGHES J

1. On 22 April 2014, an interim order was granted for the suspension of the respondent. In addition he was called upon to shew cause why this order should not be made final.
2. On 28 October 2013, the application for his suspension was served personally upon him. The respondent filed his notice of intention to defend on 1 November 2013 and his answering affidavit on 26 May 2014.
3. The respondent was admitted on 4 September 2006 and initially practised as a partner and director of Botes, Jafta, Kyle Incorporated. He left the aforesaid incorporation on 20 February 2008 and practised for his own account from 25 February 2008 in the name and style of Kyle Attorneys. At some point in July 2012, the respondent was appointed Managing Director of Beryl Holdings. Currently, the suspension of the respondent is an interim measure and he is not practising as an attorney as of 22 April 2014.

Points in limine Raised

4. The respondent raised the following points in limine in his answering affidavit:
  - 4.1 The identity, existence and status of the applicant, the Law Society of the Northern Provinces, were placed in dispute.
  - 4.2 The identity of the deponent of the applicants founding affidavit, that is the president of the law society, and his knowledge to depose to the affidavit was yet another issue that was raised as a point in limine.
  - 4.3 The resolution taken by council on 2 September 2013 authorising the president of the law society to bring this application to suspend the respondent was also raised as a point in limine.

The applicant preferred the relevant reply to the points raised. The respondent conducted his own defence and during his presentation of his argument on the points above he capitulated and the eventuality was an abandonment of the points raised. Even though this is the situation, we find ourselves in a position where we feel that it is essential to summarily deal with the laws creating the societies and the council together with the powers, duties and objectives of these institutions.

Society, Council and the President.

5. According to the definition section of the Attorneys Act 53 of 1979 (the Act) the definition of society means, “law society referred to in section 56”.

Section 56 of the Act states:

*“the law societies known as - (a) in the case of the law society of the province of the Cape of Good Hope, The Law Society of the Cape of Good Hope;(b) in the case of the law society of the province of Orange Free State, The Law Society of the Orange Free State;*

- (c) in the case of the law society of the province of the Transvaal, The Law Society of the Transvaal; (d) in the case of the law society of the province of Natal, The Natal Law Society; (e)... shall, notwithstanding the provisions of section 86, continue to exist as juristic persons. ”
6. It is trite that the Law Society of the Transvaal is known as the Law Society of the Northern Provinces as cited in the present case.
7. Section 57(1) of the Act dictates that every attorney practising, whether for his own account or otherwise, in any province, shall be a member of that specific society. Simply put, in each province, we have a law society (the society) and every practising attorney shall be a member of that society within the province that the attorney practises.
8. Moving along, section 58 and 59 of the Act respectively set out the objectives and powers of the societies. I do not intend to cite these objectives and powers, as they are extensive. In section 60 of the Act, we find mention is made of the council. According to section 60(1), the council controls and manages the affairs of the society, subject to the provisions of section 60(2).
9. The council itself comprises of elected members from the society concerned, section 61. From its members, a council shall elect a president who shall also be the president of the society concerned, holding office for a prescribed period, section 63. The council convenes meetings, which are regulated by section 64. In these meetings, the decisions of those in the majority are decisions of the council. These decisions and acts are undertaken under the authority of the council after the council meetings are held in terms of section 66.
10. The president of the council is the president of the society concerned. In the present case, as per annexure of the application papers, the council met on 30 August 2013 and a decision was taken to move an application to suspend the respondent. On 2 September 2013, the decision taken by council was drafted as a resolution by the secretary of the society. The president deposed to the founding affidavit, having been duly authorised by the council.
11. In light of the above, it is evident that the points raised by the respondent, were disingenuous, without merit and would have been rejected by this court, had the respondent not made the concessions he did which culminated into the abandonment of these points.

The Application

12. Turning to deal with this application it is trite that this court exercises its discretion when it determines whether an attorney is a fit and proper person. If it has established that indeed, the attorney is not a fit and proper person to practice as such, this court needs to decide whether the attorney should be suspended or struck off, section 22(1)
- (d) of the Act.
13. The applicant is the *custos morum* of the attorney's profession and has the duty to protect the public and integrity of the profession. The proceedings are disciplinary in nature and *sui generis*. There is no *lis* between the applicant and the respondent.
14. Applications of this nature are regulated by section 22(1 )(d) which dictates that a three stage inquiry be conducted, namely:
- 14.1 the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities; if so
- 14.2 it must decide in its discretion whether the person concerned is a fit and proper person to practice as an attorney and this requires a value judgment; and if not
- 14.3 the court must in its discretion, which involves yet again a value judgment, determine whether the attorney should be merely suspended for a period or whether the attorney should be removed from the roll.
15. When the initial application was heard on 22 April 2014, the respondent had filed no papers, instead, the respondent appeared in person and made submissions from the bar. On the strength of the application papers of the applicant together with the submissions and argument advanced by both the applicant and the respondent, the court exercised its discretion and ordered the interim suspension of the respondent.
16. The case made out by the applicant against the respondent is that:
- 16.1 The respondent practised without a Fidelity Fund Certificate from 2009 until April 2014, the latter being the date of his interim suspension;
- 16.2 The respondent failed to submit his Auditor's Report for 28 February 2011 and 28 February 2012;
- 16.3 He failed to comply with FICA requirements and failed to keep proper accounting record of his practise;
- 16.4 He failed to co-operate with the applicant when an inspection of his accounting records was sought; and
- 16.5 He failed to account to his clients, he delayed payments of trust funds to clients and he failed to give proper attention to his client's affairs.

The Law

17. Section 41(1) of the Act provides that an attorney may not practise for his own account for reward without being in possession of a fidelity fund certificate. Section 41(1) reads as follows:

*“A practitioner shall not practise or act as a practitioner on his own account or in a partnership unless he is in possession of a fidelity fund certificate.”*

A practitioner obtains the certificate having complied with section 42(3) (a) which dictates that a practitioner must make an application, which must be accompanied by a contribution of the necessary fee payable. In addition, the practitioner must have complied with all outstanding lawful requirements of the society. If one fails to comply with the aforesaid, section 83(10) sanctions a practitioner who practises without a fidelity fund certificate, in that such conduct amounts to a criminal offence resulting in a practitioner being fined.

#### Application of the Law

18. The respondent contended that the issue of practising without a fidelity fund certificate for the periods 2009 to 2011 was res judicata as an application had been made, where a judgment was handed down with regards to the very same period raised. In an attempt to confirm that, the matter was res judicata the unreported case of Law Society of the Northern Provinces v Frederick Simon Botes and Frederick Kyle, case no 70743/0 was handed to the court. According to the respondent, in this case the court dismissed the applicant's case against him.
19. It is evident from the judgement that the application was one that concerned the respondent whilst he practised under the style Botes, Jafta, Kyle Inc. The case advanced by the applicant in that application was that the directors of Botes, Jafta, Kyle Inc. failed to submit their “opening auditors report” for the period ending March 2007 and the “certificate from its accountant” within six months after the annual closing of its books of account for 28 February 2008.
20. The court found that there was no obligation upon the respondent to submit the opening auditors report and certificate from the accountant as requested, as he was not liable to do so having resigned from Botes, Jafta, Kyle Inc. on 20 February 2008. It is also evident, in that application, that the respondent had submitted an opening audit report on 17 April 2009 for the period 25 February 2008 to 31 May 2009 in respect of his current practise Kyle Attorneys. The court had this to say at paragraph [54] of the judgement:
- [54] “This brings me to one last submission made on behalf of the Applicant, namely, the fact that the Second Respondent is currently practising without the required fidelity fund certificate. It, however appears that the fidelity fund certificate was withheld from him presumably because of this application. He, however, timeously requested, as is apparent from his letter dated 24 February 2008(Annexure FK4, record p.93), an updated fidelity fund certificate as he at the time commenced with a new practice under the name and style Kyle Attorneys. As the matter stood at the time there was no reason to withhold any fidelity

certificate from him. There is accordingly in my view no reason why he should be suspended. ”

21. What comes to the fore from the judgment is that the applicant withheld the fidelity fund certificates of the respondent for the period 2009 and
2010. In the circumstances, it makes sense that the respondent had applied for and submitted the relevant documentation for these periods. Thus, the case against the respondent regarding the periods 2009 and 2010 will not be entertained by this court, as there has been compliance by the respondent to the applicant's request. For whatever reason, the applicants decided to withhold the certificates for these periods.
22. In these proceedings, the applicant conceded that that there had been compliance by the respondent in respect of the certificates, which were withheld. The applicant however, persists with the non-compliance of the submission of the respondent's rule 70

reports, in respect of the periods 2011 and 2012 in term of the rules of The Law Society of the Northern Provinces.

23. The respondent submitted that the applicant did not have the necessary authority in terms of the Act to exercise the power to seek compliance from the respondent to submit the rule 70 reports, keep proper books of account and allow the applicant to inspect the books of accounts. He argued that only the fidelity fund was empowered with such authority. The respondent argued that in terms of section 42(1) of the Act he was only to make an application to “the secretary of the society concerned” for the fidelity fund certificate. He was of the view that this secretary was the secretary for the fidelity fund and contended that this responsibility of the secretary could not be delegated to the applicant.
24. Let us test this argument. As stated above the definition of society is, “law society referred to in section 56”. If one refers to the paragraphs supra, I have dealt with the society and council establishment, their objectives and powers.
25. The Law Society of the Northern Provinces is the relevant society in this instance. The secretary referred to in section 42(1) is thus the secretary of that particular law society, in this case the applicant's secretary. Section 42(1) reads “a

practitioner on his own account or in a partnership, and any practitioner intending so to practise, shall apply in the prescribed form to the secretary of the society concerned for a fidelity fund certificate. ” [My emphasis]

26. It is more than evident that the society is the applicant in this case and as such over and above the defined powers that the society has, it also has the power set out in section 59(k), that is the power to “generally, do anything that is necessary for or conducive to the attainment of the objects of the society, and the generality of this provision shall not be limited by the preceding paragraph of this section” in order achieve its objectives

27. Keeping the aforesaid in mind, it is the duty of the applicant to bring to this court's attention such conduct by any practitioner who might be causing harm to the unsuspecting public and the Attorneys Fidelity Fund. If the applicant does not take these proactive steps, then practitioners like the respondent might continue to practise as an attorney without being in possession of a fidelity fund certificate.
28. The applicant owes a duty to this court and to the public to bring the conduct of the respondent to the court's attention. A practitioner cannot practise as an attorney for his own account without being in possession of a fidelity fund certificate, as in this very case. Likewise, the respondent cannot question the authority of the applicant as its powers and objectives are regulated
- by statute, sections 58 and 59 with section 59(k), which give the applicant the power to "do anything that is necessary for or conducive to the attainment of the objects of the society".
29. In these circumstances, it is my view that the applicant has acted within the confines of the relevant legislation in the furtherance of regulating one of its practitioners. There is thus no merit in the respondent's argument that the applicant has no powers to regulate and reprimand its practitioners who fail to comply with the Act.
30. According to rule 70.3, the duty lies with the attorney of the practise, if he is practicing for his own account, to ensure that the report, which must be prepared by an accounting officer, in terms of rule 70.4, is in fact furnished.
31. The respondent failed to cause his accounting officer to lodge an unqualified audit report as required by the applicant's rule 70.4 read with rule 70.3 for the periods ending February 2011 and February 2012. Section 41 of the Act provides that an attorney may not practise for his own account for reward without being in possession of a fidelity fund certificate whilst section 83(10) makes it a criminal offence for an attorney to so practise. As a result of the respondent's failure to lodge the required unqualified rule 70 audit report, the respondent was not issued with a fidelity fund certificate for the periods commencing March 2012 and March 2013.
32. The respondent having failed to comply with rule 70.3 and 70.4 and having practised in contravention of section 41(1) and section 41(2) without a fidelity fund certificate, the said conduct is clearly in contravention of the legislation set out above and in terms of section 83(10) amounts to a criminal offence.
33. On the facts, set out above it is not even necessary to deal with the other complaints advanced by the applicant. The facts clearly illustrate that the respondent did not practise with a certificate in 2011 and 2012. The gravity of this deviation in terms of the statutes is sufficient for this court to confirm the rule nisi issued on 22 April 2014.

The order sought

34. The applicant seeks an order as is encompassed in the notice of motion page 2 to 12 of the indexed papers. The respondent has

objected to an order being granted as sought by the applicant in its notice of motion. The respondent argues that an application for the order sought, for the appointment of a curator bonis, ought to be made to the Master. This is not correct, as section 78(8) of the Act makes provision for the applicant, on application to this court and on good grounds shown, to seek the court to appoint a curator bonis to control and administer the trust account. In so doing, it prohibits a practitioner from operating his trust account. Section 78 also sets out the ambit that the curator bonis is entitled to work within. This ambit is replicated in the order sought by the applicant. In my view, there is thus no merit in the respondent's argument, that the order sought by the applicant, seeks to widen the scope, ambit and powers of the curator bonis. The respondent has raised no plausible argument for this Court not to accede to the applicant's request for the order so sought.

35. The applicant has sought the suspension of the respondent and not his striking off. In the circumstances, I concur that the suspension of the respondent is indeed the correct order to be granted. However, in my view this suspension cannot be for an indefinite period as requested by the applicant. The correct approach is to set a period within which the suspension of the respondent will be operative. I am satisfied that a period of six months from the date of hearing this application (10 October 2014) is sufficient.

36. In the result the following order is made:

36.1 The Rule Nisi granted on 22 April 2014 is hereby confirmed.

36.2 The respondent, Frederick Kyle, is suspended from practising as an attorney of this court for a period of six months from 10 October 2014.

36.3 Prayers 2 to 1z, inclusive of their sub paragraphs, as is set out in the notice of motion dated 17 October 2013 (Annexed as A) are hereby granted.

36.4 The respondent is ordered to pay the costs on an attorney and client scale.

W. Hughes

Judge of the High Court

I agree and it is so ordered;

J. W. Louw

Heard on: 10 October 2014

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Ref: Mr Bloem/cj/B31170

Respondent appeared In Person:

MR FREDERICK KYLE

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*"1. That FREDERICK KYLE, (the respondent) be suspended from practising as an attorney on the terms and conditions as this Honourable Court may deem appropriate.*

2. That respondent immediately surrenders and delivers to the registrar of this Honourable Court his certificate of enrolment as an attorney and conveyancer of this Honourable Court.
3. That 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 certificates are, be authorised and directed to take possession of the certificates and to hand it to the Registrar of this Honourable Court.
4. That respondent be prohibited from handling or operating on his trust accounts as detailed in paragraph 5 hereof.
5. 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 Africa in 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 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:

5.1 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 purpose as may be necessary to bring to completion current transactions in which respondent was acting at the date of this order,

5.2 subject to the approval and control of the board of control of the fund and where monies had been paid incorrectly and uniawfuiiy from the undermentioned trust accounts, to recover and receive and, if necessary in the interests of persons having lawful claims upon the trust accountfs) 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 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);

5.3 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); 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;

5.4 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 determinewhether 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;

5.5 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;

5.6 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;

5.7 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 10 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, if respondent is insolvent, to the trustee(s) of respondent's insolvent estate;

5.8 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 in the trust banking account(s) amongst the trust creditors alternatively to pay the balance to the Attorneys Fidelity Fund;

5.8 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

5.9 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 he may regard his duties as curator as terminated.

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

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

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

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

6.4 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;

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

6.6 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;

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

6.8 any close corporation liquidated in terms of the Close Corporations Act, 69 of 1984, administered by respondent as or on behalf of the liquidator; and

6.9 respondent's practice as an attorney of this Honourable Court, to the curator appointed in terms of paragraph 5 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.

7. That 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 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 to take possession thereof wherever they may be and to deliver them to such curator.
8. That the curator shall be entitled to:
  - 8.1 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;
  - 8.2 require from the persons referred to in paragraph 8.1 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 respondent provided that any person entitled thereto shall be granted reasonable access thereto and shall be permitted to make copies thereof; and
  - 8.3 publish this order or an abridged version thereof in any newspaper he considers appropriate.
9. That 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(l)(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(l)(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 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;
  - 9.5.1 liquidator of any dose corporation appointed in terms of section 74 of the Close Corporation Act, No 69 of 1984.
10. That respondent be and is hereby directed:
  - 10.1 to pay, in terms of section 78(5) of Act No. 53 of 1979, the reasonable costs of the inspection of the accounting records of respondent;
  - 10.2 to pay the reasonable fees of the auditor engaged by applicant;
  - 10.3 to pay the reasonable fees and expenses of the curator, including travelling time;

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

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

10.6 to pay the costs of this application on an attorney-and~dient scale.

11. That 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 the 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. That a certificate issued by a director of the Attorneys 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."

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