IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

Case no. 2970/2017
Date heard: 20/9/18
Date delivered: 2/10/18
Not reportable

In the matter between:

Law Society of the Cape of Good Hope **Applicant**

and

Mzwandile Tonny Cedric Bobotyana **Respondent**

JUDGMENT

Plasket J:

[1] The applicant, the Law Society of the Cape of Good Hope, applied to interdict the respondent, Mr Mzwandile Tonny Cedric Bobotyana, from practising as an attorney pending an application for his name to be removed from the roll of attorneys. It also applied for additional, related, relief as is customary in matters of this kind.[1] The application was opposed by the respondent.

Background

[1] The notice of motion is 12 pages long. In addition to the interdict that is sought in paragraph 1, orders are also sought, for instance, to compel the respondent to deliver his certificate of enrolment to the Registrar; to deliver books of account, records, files and documents to a curator; and for the appointment of that curator. Cost on an attorney and client scale are also sought.

[2] The notice of motion was issued on 23 June 2017. The respondent's answering affidavit was filed and served on 28 August 2017. The applicant's replying affidavit was filed and served on 28 March 2018.

[3] The matter was set down on the opposed motion court roll on 31 May 2018. On that day, it was postponed at the respondent's instance to 10 August 2018: he said that he had not been aware before that day that his attorneys had withdrawn on 3 November 2017. On 10 August 2018 the matter was postponed by agreement to 20 September 2018. It was postponed for two reasons. First, Roberson J, who was on motion court duty, was not able to hear the matter and, had it proceeded, she would have had to recuse herself. Secondly, no arrangements had been made for a second judge to form the required quorum of two judges.[2]

[4] On 11 September 2018 the respondent served a notice, styled 'Notice in terms of Rule 35', on the applicant. The notice was never filed and we saw it for the first time when it was handed up by Ms Watt, who appeared for the applicant. The notice was dated 10 May 2018. On 18 September 2018 a notice of acting, also dated 10 May 2018, was served on the applicant. It indicated that Gqeba Steven Khuselo Inc of East London, locally represented by Mqeke Attorneys of Grahamstown, acted for the respondent. This notice was never filed and we also saw it for the first time when Ms Watt handed it up.

[5] Despite the notice of acting, the respondent appeared in person. In answer to a query from the bench as to why he was not represented by his attorneys, he pleaded poverty. In the interests of finalising the matter we decided to proceed on this unsatisfactory basis.

[6] While the respondent disavowed that he was seeking a postponement, he submitted that the matter could not proceed on the merits until the applicant had complied with the requests in the rule 35 notice. Ms Watt argued that the service of the rule 35 notice over a year after the service and filing of the respondent's answering affidavit was nothing but an abuse of process and a bad faith delaying tactic.

[7] Having heard argument from the parties, we were of the view that, as the respondent wanted compliance with the notice prior to the merits being heard, he had, in effect, sought a postponement. We dismissed this de facto application for a

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[2] See rule 19(*b*)(v) of the Joint Rules of Practice for the High Courts of the Eastern Cape Province.

postponement and stated that we would furnish our reasons in the judgment on the merits of the application. Our reasons follow.

The rule 35 issue

[8] Rule 35 deals with discovery, inspection and production of documents. The only sub-rules of rule 35 that could have any relevance to these proceedings are rules 35(12) and (13). The former provides that a party to proceedings may, by the delivery of a notice, require the other party to provide any document or tape recording to which reference had been made in any of that party's pleadings or affidavits. The latter provides that the provisions of rule 35 'relating to discovery shall *mutatis mutandis* apply, in so far as the court may direct, to applications'.

[9] It is clear that the notice does not comply with rule 35(12) because documents are requested that post-date the replying affidavit and so could not have been referred to in the applicant's affidavits.[3] Indeed, most of the documents requested were not referred to in the applicant's papers and some were clearly in the possession of the respondent, such as correspondence which he had received from the applicant or correspondence which he sent to the applicant.

[10] The notice also does not comply with rule 35(13) – and does not bring s 35 into play – because, as Southwood J held in *Afrisun Mpumalanga (Pty) Ltd v Kunene NO & others*,[4] rule 35 does not apply to an application in the absence of a direction from the court that it does apply. As no application in terms of rule 35(13) has been made, there is simply no basis to require the applicant to produce the documents referred to in the notice. That being so, there is no reason why the application cannot proceed on the merits.

[11] Apart from that, no explanation has been offered as to why the respondent waited over a year after his answering affidavit was filed, and one week short of six months after the filing of the replying affidavit, before serving the notice on the applicant.

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[3] See for example, items 10 and 11. They read:
'10 Copy of letter or email or any other form of communication with the Respondent by the Applicant during July 2018.
11 Copy of a response letter by Respondent to the Applicant during July 2018.'

[4] *Afrisun Mpumalanga (Pty) Ltd v Kunene NO & others* 1999 (2) SA 599 (T) at 611G-H. See too *Premier Freight (Pty) Ltd v Breathetex Corporation (Pty) Ltd* 2003 (6) SA 190 (SE) paras 9-10.

[12] The notice is dated 10 May 2018. No explanation has been given for the delay between that date and the date of its service on the applicant on 11 September 2018. It is important to bear in mind that the matter was set down for 31 May 2018, when it was postponed, and on 10 August 2018, when it was postponed again, yet the notice was held back by the respondent on both of these occasions. He has offered no explanation for this extraordinary conduct.

[13] From the facts that I have set out, we were of the view that the most probable inference to be drawn was that the service of the notice was nothing but a mala fide abuse of process intended as a delaying tactic. In these circumstances, we treated the respondent's submissions as an application for a postponement and dismissed it with costs.

The merits of the application

[14] We proceeded to hear the main application. After Ms Watt had addressed us, the respondent said that he had no submissions to make because he had prepared for the rule 35 argument only and had not prepared on the merits of the application.

[15] It is common cause that the respondent claimed to be empowered by a power of attorney to sell a property owned by a deceased estate. His actual authority to sell the property is questionable since, it would appear, the deceased's widow, who signed the power of attorney in his favour, was not the executor of the deceased estate and thus had no power to sell the property.

[16] Mr Afzal Muhammad was interested in purchasing the property. On 7 March 2016 he entered into a deed of sale with the respondent in terms of which he purchased 'Erf 58, corner Indwe and Monesi Roads, Lady Frere' for a price of R2 150 000. The deed of sale also provided that the respondent was entitled to commission of R50 000. During the course of March and April 2016, Mr Muhammad made payments into the respondent's trust account that totalled R2 176 000. Receipt of these payments is admitted by the respondent.

[17] It is also common cause that the property was not transferred to Mr Muhammad. Because of the lack of authority of the deceased's widow, the transfer of the property could not be effected. As a result of the delay in the finalisation of the sale, Mr Muhammad approached attorneys who began to make enquiries of the respondent. Eventually, the attorneys forwarded a complaint to the applicant. The police also became involved.

[18] When, in August 2016, access was gained to the respondent's trust account, the payment by Mr Muhammad of R2 176 000 was confirmed but the account's balance was only R81.88. These allegations were 'noted' by the respondent in his answering affidavit, with the result that they have not been denied and must be accepted as proved.[5]

[19] In the founding affidavit, it was stated that cash in the amount of R160 000 had been withdrawn from the trust account, various cheques totalling R32 952.90 had been drawn on the account, R40 000 had been paid from the account in respect of the respondent's personal vehicles, R13 000 was paid to his wife, R866 786 was paid to a person by the name of Z Yafele and internet payments without details of payees were made in the total amount of R775 836.59. In answer to these allegations, the respondent stated:

'I wish to state that because of the matter being subjudice in the Regional Court, QUEENSTOWN if I put my defence in these proceedings I will be prejudiced. The best thing that should have been done by the Applicant was to call for Disciplinary Hearing if they wanted to hear both sides of the story and establish the truth of the matter. I believe that I have a valid defence in the matter and the two special powers of attorney are still valid up until the court decide otherwise. I still have to put my case, that is in fairness without being intimidated.

I wish to put on record that I am the signatory in the Trust Account whoever requires explanation, that person needs to consult me for explanation if not satisfied that person may do the necessary in the circumstances.'

[20] The respondent in his answer to the allegations that the listed payments were made from his trust account has not placed them in dispute. His reason appears to be that he believes that he may prejudice his defence in the criminal trial if he discloses his version in these proceedings. In *Law Society of the Cape of Good Hope v Randell*,[6] a case concerning an application for the stay of a striking-off application pending the completion of a criminal trial, the court held that in these circumstances a party has a choice to make between disclosing his or her defence and exercising his or her right to silence; but, in the absence of an element of state compulsion, the party had to choose and to suffer the consequences of the choice. In this instance, as in *Randell*, I cannot see what prejudice the respondent would be

[5] *Wightman t/a J W Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA) paras 11-13.
[6] *Law Society of the Cape of Good Hope v Randell* 2013 (3) SA 437 (SCA).

exposed to if he answered the allegations because his version is that he has done nothing wrong. As a result, the respondent's exercise of his right to silence has the result that the allegations under answer have not been denied, no real, genuine or bona fide dispute of fact has been created and the applicant's factual allegations, being credible, must be accepted.

[21] In summary, then, the common cause or undisputed facts establish that in March and April 2016, Mr Muhammad paid a total of R2 176 000 into the respondent's trust account, that the respondent was the only person with control of the trust account and that, in August 2016, the balance of the trust account was R81.88. From these facts and the record of payments from the trust account, the conclusion is inescapable that the respondent misappropriated the money that Mr Muhammad had entrusted to him.

[22] The respondent asserted in his answering affidavit that in his dealings with Mr Muhammad, he 'utilized the values of honesty, trustworthy, (sic) integrity, reliability and accountability'. In view of the facts that I have dealt with above, this is nothing but a cynical falsehood. The respondent's conduct falls far short of the standards of probity and honesty expected of attorneys. As a result, the court hearing the striking-off application may well order that the respondent's name be removed from the roll of attorneys.[7]

[23] In order to be granted the interdict for which it has applied, the applicant is required to establish a clear right, an injury that has either occurred or is reasonably apprehended and the absence of any other suitable remedy.[8] In my view, it has done so.

[24] First, the applicant acts in the public interest and 'the clear right involved is the right of the public to be protected from attorneys who misappropriate their clients' money'.[9] Secondly, as I have shown, the misappropriation of Mr Muhammad's money has been established by the applicant. In *Law Society of the Cape of Good Hope v Nompozolo*[10] I held in respect of the misappropriation of money by an attorney:

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[7] *Botha v Law Society, Northern Provinces* 2009 (1) SA 227 (SCA) para 2; *Law Society of the Cape of Good Hope v Mayekiso* ECM 12 October 2017 (case no. 1868/2015) unreported para 61.
[8] *Setlogelo v Setlogelo* 1914 AD 221 at 227.
[9] *Law Society of the Cape of Good Hope v Nompozolo* ECG 3 September 2009 (case no.624/09) unreported para 17.
[10] Note 9 para 18.

'From this course of conduct two inferences can be drawn. First, the funds of clients of the respondent other than the three complainants are at risk on an ongoing basis; and secondly, the respondent, by misappropriating the complainants' money is not a fit and proper person to practice as an attorney.'

The same inferences can be drawn from the respondent's conduct in this case.

[25] Thirdly, particularly in view of the fact that the applicant litigates in the public interest, there is no suitable remedy, other than an interdict, that is available to it that will effectively protect members of the public, pending the striking-off application.[11]

[26] The applicant has established its entitlement to an interdict but a time limit must be imposed in respect of the initiation of the application for the removal of the respondent's name from the roll of attorneys. A period of three months within which to do so is reasonable.

[27] In the result:

(a) An order is granted in terms of paragraphs 1 to 11 of the notice of motion.

(b) The application for the removal of the respondent's name from the roll of attorneys must be issued within three months of the date of this order, failing which the orders referred to in paragraph (a) above, save for the costs order, shall lapse.

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C Plasket

Judge of the High Court

I agree.

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R Brooks

Judge of the High Court

APPEARANCES

[11] *Law Society of the Cape of Good Hope v Nompozolo* (note 9) para 19.

For the applicant:	K Watt Instructed by N N Dullabh & Co, Grahamstown
For the respondent:	In person