



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

CASE NR: 42471/2013

DATE: 9/4/2014

| | |
|--------|---------------------------------------|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES / NO |
| (3) | REVISED. |
| 4/4/14 | |
| DATE | SIGNATURE |

In the matter between:

YASMIN OMAR

APPLICANT

and

**THE LAW SOCIETY OF THE
NORTHERN PROVINCES**

FIRST RESPONDENT

MS T MOOLA

SECOND RESPONDENT

JUDGMENT

MULLER AJ:

- [1] The Applicant is a practitioner duly admitted as an attorney and is practising at a law firm, Zehir Omar Attorneys.
- [2] The Respondents are, firstly, the Law Society of the Northern Provinces (hereinafter referred to as "the society") and secondly Ms T Moola, an official who is employed by the society as a legal officer in its disciplinary department.
- [3] The society is a body governed by the Attorneys Act, Act 53 of 1979 (hereinafter referred to as the "Act"). I do not think that it is necessary to emphasise that attorneys are required to comply with the high standards set by the profession and also with the provisions of the Act and the rules promulgated in terms of the Act. The society, amongst its many duties and obligations, also exercises disciplinary jurisdiction over practitioners, practising within its area of jurisdiction.
- [4] Applicant instituted proceedings in the High Court:
 - (i) to review and set aside the decision of the Respondents to summons the applicant to an investigative committee meeting pertaining to a complaint by a member of the public, dated 1st January 2012.

- (ii) to review and set aside any disciplinary proceedings instituted by the Respondents against the Applicant; and
 - (iii) to award costs against Second Respondent *de bonis propriis* on a scale as between attorney and client, alternatively, against both Respondents jointly and severally the one paying the other to be absolved.
- [5] During January 2012 a client of the firm where applicant is employed lodged a complaint at the society against Mr Omar who is the senior practitioner at the firm. It is unnecessary for purposes of this judgment to deal with the content of the complaint.
- [6] Pursuant to the complaint lodged by the client, Mr Omar by letter addressed to him, by the society, was afforded the opportunity to respond to the allegations made against him. The letter was signed by an officer in the disciplinary department of the society. The letter also recorded that should he fail to respond on or before a particular date the writer will have no option but to refer the matter to a disciplinary committee.
- [7] Mr Omar complied with the request of the society. Subsequently Mr Omar received a further letter (dated 3 October 2012) requesting him to make himself available to appear before an investigating committee of the council of the society in order to discuss, explain or elucidate the complaint. It is important to add that the letter dated 3 October 2012

was signed by a director (MJS Grobler) of the society. Mr Omar's attention was specifically drawn to rule 97A.2 and 97A.3. I will revert to the rules referred to above presently. Mr Omar requested further particulars pertaining to the complaint. The mandate of Zehir Omar Attorneys had been terminated in the interim and the content of the file of the complainant was handed back to him. Due to the society's failure to furnish further particulars as requested the meeting of the investigating committee failed to proceed on the appointed date. Eventually another date for the meeting was arranged for 16 July 2013 in a letter dated 6 May 2013 that stated *inter alia*: "Writer confirms that the Disciplinary Meeting scheduled for 16 July 2013 will be before an Investigating Committee for the discussion of the complaint against you and against yourself. The Investigating Committee will thereafter deliberate and recommend if there are merits in the complaint for charges to be formulated by writer".

- [8] A further letter dated 29 May 2013 also confirmed the date with reference to a "disciplinary meeting". Mr Omar was also informed that he may not send a representative to attend on his behalf. It is clear from the said letter that the purpose of the investigating committee is to investigate and to make recommendations to the council whether there is merit in the complaint (whether a *prima facie* case has been made out) for formal charges to be formulated.

- [9] The next day a letter was addressed to applicant requesting her to appear on the same date before an investigating committee in order to discuss, explain or elucidate the complaint by the complainant. This letter was also signed by director, M J S Grobler.
- [10] Zehir Omar Attorneys on 14 June 2013 directed a letter to the society complaining that the particulars requested had not been forthcoming. The society was also alerted to the fact that the meeting to be held was a disciplinary meeting and that further particulars are required. Applicant was informed by letter that a disciplinary meeting and an investigating meeting and a disciplinary meeting were the same thing. The letter requesting applicant to attend the investigating committee was construed by the applicant as a summons to attend a committee meeting. The society was requested to furnish reasons for the decision to summon applicant in terms of section 5(1) of PAJA, Act 3 of 2000. In response to the letters dated 11 June 2013 and 14 June 2013 Second Respondent addressed letters to both Mr Omar and applicant. In the said letters Second Respondent made it clear that they were not formally charged pending the recommendation of the investigating committee and that the request for further particulars was premature. They were further informed that the pro-forma prosecutor (Second Respondent) has a discretion to call the relevant parties before a disciplinary meeting or hearing. Second Respondent explained the position thus: *"Please be advised further that writer as the pro-forma*

Prosecutor has the discretion to call relevant parties for a Disciplinary Meeting or Hearing. In light thereof, Mrs Omar was called in order to properly ventilate the issues before the Investigating Committee of the Law Society of the Northern Provinces. Writer wishes to place on record that Mrs Omar received timeous notice in this regard as required by the Rules of the Law Society of the Northern Provinces. Writer is not required to furnish yourself with any further justification or explanation for calling Mrs Omar to the Meeting.

Please be advised further that my colleague previously placed this matter before an informal "B" Investigating Committee of the Law Society of the Northern Provinces who were of the view that you attend a Discussion, which recommendation writer agrees with. Writer reiterates that writer will not enter into further debate with yourself as writer has efficiently explained your issues of concern in previous correspondence exchanged herein, and more specifically in writer's letters dated 29 May 2013 and this letter dated 19 June 2013.

Writer trusts that yourself and Mrs Omar will avail yourselves on 16 July 2013".

- [11] The society in its opposing affidavit made it clear that applicant was not served with a summons to appear before the investigating committee, but was simply notified to do so by letter. It is common cause that applicant was not afforded the opportunity to make written

representations to the society, as was the case with Mr Omar. It is admitted by the society that the reference in the letter dated 19 June 2013 to a "disciplinary meeting" was in error. It is denied by the society that it is necessary for a formal resolution of council to initiate an investigation after a complaint had been received. Finally, it was stated in the opposing affidavit that the society has subsequently decided not to continue with any disciplinary action against Mr Omar or applicant.

- [12] The record of the proceeding was filed by the society. The contents thereof are not in dispute. It revealed that the complainant was not present. He could not be contacted telephonically. The committee could therefore not consider all matters and issues. It is recorded that the following was recommended by the investigating committee: *"No resolution was arrived and the recommendation made by the committee was that a further meeting should be convened with both complainant and Ms Y Omar and Mr Z Omar present and, most importantly, it should be made clear to the complainant that the Law Society of the Northern Province is extremely annoyed at his contemptuous ignoring the meeting and not attending and not even tendering an explanation or the reason for his absence and his ignoring the prosecution or his inability to attend or decision not to attend.*

The committee also felt that the complainant should be informed that the committee considered mulching the complainant with the costs of

the meeting but had decided against same in absence of any explanation from him for his absence.

The committee was appraised of an application for review launched by attorneys Z Omar but had no discussion thereon as it was not an item on the agenda".

- [13] S 67 of the Act grants the council the power to appoint one or more committees to assist it in carrying out its duties, the performance of its functions and the exercise of its powers. Such committees shall consist of members of the council concerned or of members of the society or both. The council may assign to a committee appointed in terms of subsection (1) such of its powers that it may deem fit, but shall not be divested of any power which it may have assigned to a committee and may amend or withdraw any decision of such a committee provided that if the council has assigned to a committee the power to inquire into any case of alleged or unprofessional or dishonourable or unworthy conduct and to impose any punishment in respect thereof in accordance with s 72, the council shall not amend or withdraw any decision arrived at or anything done by such committee in terms of the powers so assigned. Council therefore retained the power to exercise its own discretion despite the recommendation of an investigating committee. I will return to s 67 in due course.

- [14] Part XIII (Disciplinary Proceedings) of the rules of the society promulgated under the Act states in rule 93 that the council shall have disciplinary jurisdiction over all practitioners no matter where the conduct which is, or allegedly is unprofessional or dishonourable or unworthy is perpetrated. Rule 94(1) states: *"The council shall consider any complaint made by or on behalf of any person feeling aggrieved by reason of any alleged unprofessional or dishonourable or unworthy conduct on the part of any practitioner, whether such conduct took place before or after the promulgation of these rules"*.
- [15] Rule 95 provides that the council may, dismiss a complaint on the one hand, upon receipt of a complaint, if it is of the opinion that no *prima facie* case has been made out. Where, on the other hand, council is of the opinion that a *prima facie* case has been made out, it may adopt the procedures as referred to in rule 95.2.
- [16] Rule 95.2 states: *"Upon receipt of a complaint, the council may-*
- 95.1 ...
- 95.2 *where it is of the opinion that a prima facie case of unprofessional or dishonourable or unworthy conduct of the part of the practitioner concerned has been made out -*
- 95.2.1 *furnish the practitioner with particulars of the complaint and call upon him to furnish the council in*

writing within such time as the council may direct, with his explanation and answer to the complaint, and may require such explanation to be verified by affidavit; or

95.2.2 *at any time and whether or not it has also proceeded or also thereafter proceeds under rule 95.2.1, call upon him to appear at such time and place as it may determine to explain or elucidate or discuss the matter;*

Provided that a referral of the complaint to the practitioner shall be in writing with a copy thereof to the most senior person at the relevant firm in years of admission according to the records of the Law Society, who shall likewise respond to the complaint”.

[17] The deponent on behalf of the society states in the opposing affidavit that legal officers act on behalf of the council in terms of their mandate and exercise the powers delegated to them by the council to investigate complaints. He mentions that the society receives between 8 000 – 9 000 complaints *per annum* and that the council is not able to deal with each and every complaint received at council level. Complaints are investigated by the legal officers and such legal officers have the discretion to call the relevant parties to either an investigating committee or a disciplinary meeting and to *subpoena* witnesses. The

deponent goes on to state that it is unnecessary for a formal resolution of council to initiate an investigation concerning a complaint that had been submitted to the society. The deponent denies that Second Respondent was not authorised to investigate the complaint and to call upon applicant to attend the proceedings of the investigating committee.

[18] To my mind disciplinary proceedings begin when council, after consideration of a complaint lodged with the society, is of the opinion that a *prima facie* case of unprofessional, dishonourable or unworthy conduct has been made out and has resolved that proceedings be instituted in terms of rule 95.2.1 or 95.2.2.

[19] Applicant complains in the papers (and it was also argued) that the procedure envisaged by rule 95.2.2 can only follow after the procedure in terms of rule 95.2.1 had been instituted.

[20] I disagree. It is clear from the wording of rule 95.2.2 that the council may at any time and whether or not it has proceeded under rule 95.2.1 call upon the practitioner to appear before an investigating committee to explain or elucidate or discuss the matter. There is of course an important proviso. Rule 95.2.1 provides that particulars of the complaint lodged with the society be furnished to the practitioner to enable him to reply. In the event that the procedure in terms of rule 95.2.2 is initiated without resorting to the procedure in rule 95.2.1, particulars of the complaint lodged by the complainant must also be provided to the

be provided to the practitioner concerned. There is no reason, if particulars of the complaint have to be furnished to a practitioner under rule 95.2.1, to enable the practitioner to make written representations, why the particulars should not be provided to the practitioner when the procedure under rule 95.2.2 is invoked. The provision contained in rule 95.2.1 is manifestly included to comply with the *audi alteram partem* principle. It follows that the *audi alteram partem* principle should be extended, for the very same reason, to the procedure under Rule 95.2.2.

[21] It is common cause that particulars of complaint lodged with the society were not provided to applicant when she was called upon to appear before the investigating committee. The suggestion by the society that applicant was fully appraised of the complaint because the complaint had been furnished to Mr Omar, who is also the senior practitioner of the firm, cannot be accepted. No steps had been taken against her until she was informed to attend the investigating committee meeting. Applicant is only required to act when disciplinary proceedings are instituted against her. Until then nothing is required of her.

[22] The rule of natural justice dictates that she be informed of the particulars of the complaint. The fact that she was named in the complaint is of no concern until such time that the council has resolved that disciplinary proceedings be instituted against her. Generally bodies

that are required to investigate need not observe the rules of natural justice and bodies required to investigate facts and make recommendations to some other body or person with the power to act need not necessarily apply the rules of natural justice depending on the circumstances. *Cassem en 'n Ander v Oos-Kaapse Kommittee van Groepsgebiederaad en Andere* 1959 (3) 651 (A); *Real Printing and Publishing Co (Pty) Ltd v Minister of Justice* 1965 (2) SA 782 (C); *South African Defence and Aid Fund and Another v Minister of Justice* 1967 (1) SA 263 (A); *Bell v Van Rensburg N.O* 1971 (3) SA 693 (C) at 704 – 705, 724H, 725G; *Van der Merwe and Others v Slabbert N.O and Others* 1998 (3) SA 613 (NPD) at 624D – F.

[23] However, the rule of natural justice is applicable whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights or whenever such an individual has a legitimate expectation entitling him to a hearing. The rule of natural justice is part of the principle of legality, which is a foundational value of our Constitution (Act 108 of 1996) postulates that a public official or body concerned must act fairly. *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 A at 231F – G.

[24] In this regard the oft quoted words of Lord Denning MR *In Re Pergamon Press Limited* [1970] 3 All ER 535 (CA) at 539c-f are

apposite: *"He submitted that when there was no determination or decision but only an investigation or enquiry, the rule of natural justice did not apply ... I cannot accept counsel for the inspectors' submission. It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings ... They are not even quasi judicial for they decide nothing. They only investigate and report. They sit in private ...*

But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin a reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal proceedings or civil actions ... Seeing that their work and their report may lead to such consequences I am clearly of the opinion that the inspectors must act fairly".

The investigation and report of an investigating committee fall in the above category and is subject to that rule of natural justice. I am also mindful and have taken cognisance of the judgment in *Law Society, Northern Provinces (Incorporated as the Law Society of the Transvaal) v Maseka and Others* 2005 (6) SA 372 (BH) at 382B – F. The question in that case was whether a practitioner has the right to a hearing before

the society decide to inspect his books in terms of s70 of the Act. That case is distinguishable on the facts. The learned Judge nevertheless was of the view that the society does exercise a public power. I agree.

[25] The reason underlying the purpose of the investigating committee is to afford the parties the opportunity to canvass the complaint fully. The council is placed in a better position to determine whether a *prima facie* case has been made out or not after investigation of the investigating of all the facts and circumstances. The report of the committee to the council may have serious repercussions for practitioners and may in appropriate circumstances ruin careers and may, in addition, indeed lead to criminal proceedings. Rule 95(3) allows council upon a consideration of the complainant and the practitioner's explanation and answer thereto or elucidation of the matter, to dismiss the complaint if no case has been made out. If it is satisfied that the complaint is justified, but of a trivial nature, it may inform the complainant and the practitioner in writing of its decision and issue a written warning to the practitioner.

[26] Under Rule 95.5 council may, if it is of the opinion that a *prima facie* case has been made out, and it is not of a trivial nature, call upon the practitioner concerned on not less than ten (10) days prior notice to appear at such time and place as the council may determine in order that a further enquiry in terms of s 71 of the Act may be conducted. The

latter enquiry is formal in that it requires a summons issued under the hand of the president or secretary (not a director) of the society and served upon any person who may give material information. The summons is similar to a subpoena in a civil trial in a Magistrates Court. No summons is necessary for a practitioner to appear before an investigating committee established in terms of rule 95.2.2.

[27] I interpose, to briefly return to my earlier reference to rule 97A.2 and rule 97A.3 referred to in the letters dated 28 May 2013 in terms whereof Mr Omar and applicant were requested to appear before the investigating committee. In my view rule 97A.2 and 97A.3 are not applicable to proceedings conducted in terms of rule 95.2.2. They are applicable to an enquiry under s 71 of the Act. I am not called upon to deal with enquiries under s 71 and will not venture to do so.

[28] I turn now to determine whether the council may delegate its powers to legal officers in the employ of the society, who are not members of council, to initiate, conduct or terminate any disciplinary proceedings provided for in the Act and the rules.

[29] S 60 of the Act provides that the society shall be managed and controlled by a council which may exercise the powers of the society. Council may in terms of s67 appoint committees to assist it to carry out its duties perform its functions or the exercise its powers. S 67(1)(c)

provides that the council may designate one or more members of a committee appointed by it, as chairman.

- [30] S 67(2) states: *"a council may assign to a committee appointed by it in terms of subsection (1) such of its powers as it may deem fit, but shall not be divested of any powers which it may have assigned to a committee, and may amend or withdraw any decision of any such committee: Provided that if a council has assigned to a committee the power to enquire into any case of alleged unprofessional, dishonourable or unworthy conduct and to impose any punishment in respect thereof in accordance with section 72, the council shall not amend or withdraw any decision arrived at or anything done by such committee in terms of the powers so assigned"*.

- [31] S 69(m) and 69(p) provide that council may prescribe the procedure to be followed in connection with any enquiry referred to in s 71 and may do anything which is required for properly and effectively carrying out its duties and functions. Rule 95.1 and 95.2 provide that the council must consider complaints lodged with the society. If council is of the opinion that a complaint does not disclose a *prima facie* case, it must dismiss the complaint. If council is of the opinion that a *prima facie* case has been made out council may initiate disciplinary proceedings including proceedings in terms of rule 95.2.1 or 95.2.2 or both.

[32] There can be no doubt from a plain reading of the provisions of the Act referred to above and the rules that only council have the power to initiate disciplinary proceedings after consideration of a complaint lodged with the society. In *Attorney-General OFS v Cyril Anderson Investments Pty Ltd* 1965 4 SA 628 (AD) Botha JA stated: "*The maxim delegatus delagere non potest is based upon the assumption that, where the legislator has delegated powers and functions to a subordinate authority, it intended that authority itself to exercise those powers and to perform those functions and not to delegate them to someone else, and that the power delegated does not therefore include the power to delegate.*" S 69 allows council to delegate disciplinary functions of council to committees. It does not allow those delegated functions to be delegated by any of the committees to individual legal officers in the employ of the society. From the evidence adduced by the society, legal officers have a wide discretion to initiate, conduct, and even withdraw disciplinary proceedings. According to the deponent legal officers have the delegated power to institute proceedings referred to in rule 95.2.1 and 95.2.2. Council effectively abdicated its control of the disciplinary process to its legal officers which it cannot do. That is not what the legislature intended. It begs the question whether it is the legal officers who decide what matters are serious enough to be referred to council and what matters are not.

[33] The delegated powers of the legal officers render the recommendation of the investigating committee meaningless because Second Respondent as legal officer, decides, instead of the council (or duly appointed committee), whether a *prima facie* case has been made out, and if so, whether to proceed with further disciplinary steps. That is what happened in this case. Second Respondent, not council, has decided to initiate proceedings against applicant in terms of rule 95.2 and to discontinue further disciplinary steps despite the recommendation by the investigating committee to council to postpone the meeting. The fact that 8 000 – 9 000 complaints are received per annum affords no reason to disregard the provisions of the Act and the rules of the society.

[34] I have come to the conclusion that the decision taken by Second Respondent to initiate proceedings in terms of rule 95.2.2 against applicant is *ultra vires* the Act and the rules. However the withdrawal of all disciplinary proceedings against applicant (and Mr Omar) will render the relief claimed academic.

[35] I now come to the question of costs. The matter was originally allocated to Mali AJ in the opposed motion court. I was requested by a secretary of Ledwaba DJP to take the matter over after Mali AJ recused herself.

[36] When the matter was called before me on 13 February 2014 at 14h00. Mr Omar who appeared on behalf of the applicant argued mainly three points *in limine*.

- i) that the allocation of the case to me is improper and null and void;
- ii) that I am not appointed as acting judge; and
- iii) that the application was incorrectly removed from the roll of 14 February 2014 and erroneously set down for 10 February 2014.

[37] The application was incorrectly allocated to Friday 14 February 2014 by the Registrar. It is common cause that Respondents removed the case from the roll and set it down the 10th of February 2014. The respondent's removal of the case from the roll was the correct course to adopt. The practice in this court is to enrol opposed motions for Mondays. Applicant is not prejudiced. The request for a postponement on the basis that the case was not properly set down is unfounded.

[38] Mr Omar informed me from the bar that he himself has contacted the office of the Minister of Justice and Constitutional Development before lunch (I presume that he had spoken to an official in the office of the Minister of Justice and Constitutional Development) and was informed that the Minister is unaware of my appointment.

[39] I adjourned to obtain a copy of my written appointment from the Judge President's office. I had copies made and had them distributed to the

parties by my secretary before I returned to Court. Upon resumption, Mr Omar sought a postponement to consider whether there was proper compliance with s 175 of the Constitution of 1996. Mr Omar required, so he said, time to establish whether the Minister consulted the Judge President as required by s 175 of the Constitution. (Mr Leotlela on behalf of Respondents opposed the application for a postponement and also indicated that Respondents do not take issue with my appointment.)

[40] A Judge who presides in a case which he or she is disqualified from sitting because he or she is not duly appointed, acts in breach of s 175(2) read with s 165 and Item 6 of Schedule 2 of the Constitution. It is also important to bear in mind that s34 of the Bill of Rights is also applicable to the judiciary. Compare *President of the Republic of South Africa and Others v South African Football Union and Others* 1997 4 SA 147 (CC) at 168G-H. Litigants, no doubt, have the right to question the appointment of Judges. The onus, as in the case of an application for recusal, is on the litigant.

[41] When I enquired from Mr Omar why I was not informed beforehand in chambers of his objection to me presiding, he informed me that he suffers from a sickness and is unable to walk across the street to my chambers which is situated in the Palace of Justice. It would, in any event, have taken little effort from Mr Omar (as an officer of the court) to

have determined from the Deputy Judge-President, whose office is situated in the same building where the matter was heard or even from the office of the Judge-President after he purportedly obtained the information from the office of the Minister, which turned out to be wrong. Mr Omar did not take the obvious steps to confirm the correctness of the information he obtained. Instead of following the accepted practise in seeking a meeting with me in chambers with the representatives of the Respondents present, to put to me the grounds for my recusal, he embarked upon an oral application based on hearsay evidence, in open court without any warning.

[42] Mr Omar also took issue with the fact that the allocation of the application to me was improper because it should have been referred back to the senior Judge in the motion court who allocated the case to Mali AJ originally. He argued that the allocation is highly irregular. After having heard argument I stated to Mr Omar that the application will not be postponed and will be argued on 14 February 2014.

[43] Applicant would have been successful had the disciplinary proceeding not being withdrawn. I have decided as a mark of my disapproval, not to award costs in favour of the applicant. The attack on the procedure, which was followed when the Deputy Judge President allocated the application to me for adjudication is without merit. It was aimed at tainting the administration of justice without any justification whatsoever.

I must however in fairness also state that Mr Omar apologised to me when the arguments were concluded.

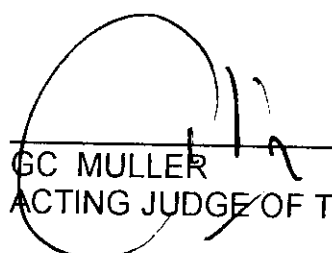
[44] Costs were sought against Second Respondent *de bonis propriis* on attorney and client scale. There is also no merit in seeking such an order.

In the result I make the following order:

ORDER:

The application is dismissed.

No order as to costs.


GC MULLER
ACTING JUDGE OF THE HIGH COURT

For Applicant: Z Omar (Attorney)
Instructed by Z Omar Attorneys
Springs

For Respondents: J Leotlela (Attorney)
Instructed by Rooth & Wessels
Pretoria

Date heard: 13 & 14 February 2014.