REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA

(GAUTENG PROVINCIAL DIVISION, PRETORIA)

CASE NO: 57490/2013

22/4/2014

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED.

2014·04·22
DATE

SIGNATURE

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES Applicant

and

FREDERICK KYLE Respondent

J U D G M E N T

THE COURT

[1] This is an application by the Law Society of the Northern Provinces (the Law Society) to have the respondent suspended from practising as an attorney, as well as related ancillary relief. The respondent was admitted as an attorney of this court on 4 September 2006 and is currently practicing for his own account in Johannesburg under the name of Kyle Attorneys. The respondent served notice of intention to oppose the application on 1 November 2013, but did not deliver an answering affidavit. The notice of set down was served personally on the respondent on 29 January 2014.

[2] The Law Society alleges that the respondent has made himself guilty of several transgressions of its rules, which conduct includes the following: practising without a valid fidelity certificate since January 2013, and for the periods 2009, 2010, 2011 and 2012; failure to submit an auditor's report in terms of rule 70 of the Law Society rules for the periods ending 28 February 2011 and 29 February 2102, respectively, which reports are still outstanding; failure to account to clients; delayed payment of trust funds; and failure to give proper attention to the affairs of his clients. The Law Society also received several complaints against the respondent from clients of the respondent, an advocate, a Bar council and an attorney.

[3] The complaints all concern failure to pay monies which were due, or the payment of which was delayed. As a result of these complaints, the Law Society appointed an auditor to conduct an inspection of the respondent's trust account. That inspection never materialized as the respondent reportedly failed to co-operate with the auditor appointed by the Law Society.

[4] When the matter was mentioned this morning, the respondent appeared in person and conveyed to us that he wished to oppose the application on the papers filed by the Law Society. In other words, he did not intend to file any answering affidavit. We pointed out to him the undesirability of such procedure, and that we deemed it unwise on his part to do so. In terms of rule 6(5) of the uniform rules of court, where a party does not wish to file any answering affidavit, but wishes only to argue a point of law, such party shall file a succinct statement containing the points of law sought to be argued.

[5] The Law Society, quite correctly, objected to this procedure, pointing out that it was prejudiced as it had no inkling what the points the respondent wished to argue were. Despite this, we gave the respondent an opportunity to indicate the nature of the points he wished to argue. During his submissions, it became clear that the respondent, among others, wished to join issue with the correctness of some of the Law Society's factual allegations against him. He also sought to hand up a court file in another, related application, which, the respondent argued, advanced his defence to the Law Society's case against him.

[6] After hearing the parties on preliminary issues, we formed a view that it would be in the respondent's interest to be afforded an opportunity to properly place before court, all what he sought to convey to us from the bar. This inevitably led to a possibility of a postponement. Although the respondent persisted that his so-called points in *limine* are dispositive of the matter, we deemed it in the interest of justice that the matter be postponed for the reason we have stated above. Ultimately the parties agreed that that the matter be postponed.

[7] It is what happens in the interim that the parties are not agreed on. The Law Society proposes that an interim order of suspension from the roll be granted. The respondent strongly disagreed, contending that such an order would effectively amount to a final order, being relief the Law Society sought in the first place. We are not certain why this should be so if he is afforded an opportunity to have that order discharged.

[8] The respondent further submitted that in any event, we do not have the power to make an interim order, as it was not sought in the papers. The only court, so was the argument, which could possibly entertain such an order is the urgent court, in which the Law Society would allege fresh facts to justify an interim suspension. We find no merit in these submissions. They are partly based on a misconception of the nature of the proceedings such as the present, and the inherent power of this court in such proceedings.

[9] Proceedings such as the present are *sui generis* and of a disciplinary nature. There is no *lis* between the Law Society and the respondent. The Law Society, as a *custos morum* of the attorneys' profession, places before court facts for consideration and an exercise of a discretion. See generally: *Hassim v Incorporated Law Society of Natal* 1977 (2) SA 757 (A) at 767 C-G; *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T) at 393E; *Cirota & Another v Law Society, Transvaal* 1979 (1) SA 172 (A) at 187 H and *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 851E-F.

[10] The question whether an attorney is no longer a fit and proper person to practice as such lies, in terms of section 22 (1) (d) of the Act, in the discretion of the court. See *Law Society of the Good Hope v Budricks* 2003 (2) SA 11 (SCA). Once a court has determined that an attorney is no longer fit to remain on the roll of

attorneys, the court must determine an appropriate sanction, namely a suspension from practice or striking from the roll. This determination also lies within the discretion of the court. The opinion or conclusion of the Law Society that a practitioner is no longer a fit and proper person to practise as an attorney carries great weight with the court, although the court is not bound by it: *Kaplan v Incorporated Law Society, Transvaal* 1981 (1) SA 762 (T) at 781H.

[11] The application requires a three-stage enquiry. First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is factual enquiry. Second, it must consider whether the person concerned is 'in the discretion of the court' not a fit and proper person to continue to practice. 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 enquire 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 (*Law Society, Northern Provinces v Mogami and Others* 2010(1) SA 186; [2010] 1 All 315 (SCA) para 14).

[12] *In Summerley v Law Society, Northern Provinces* [2006] SCA 59 (RSA) para 2, the court explained the test to be applied during the third stage of the enquiry as follows:

> 'The third enquiry again requires the Court to exercise a 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 practice as an attorney deserves the ultimate penalty of being struck from the roll or whether an order of suspension from practice will suffice.'

[13] In the present case, as stated in the introduction, the respondent has not filed any answering affidavit. The allegations of the Law Society, based on the complaints against the respondent, stand unchallenged, and we have no reason not to accept them as correct. Even if one ignores all other allegations which the respondent might join issue with, it is indisputable that the respondent is currently practicing without a valid fidelity fund certificate. This places the public at risk. On this consideration alone, we are of the view that the public should be protected against the respondent.

[14] The postponement should be subject to a rule nisi suspending the respondent from further practice. We would be shirking our responsibility towards the public were we not to adopt that course. There is no prejudice to the respondent as he would be entitled to show cause why that order should not be confirmed. If he has such a strong defence to the Law Society's case against him, he should not be unduly concerned about an interim order, which would be discharged once he places his version before the court.

[15] Finally, the issue of costs. In matters such as these, policy considerations are that the Law Society, as the *custos morum* of the attorneys' profession, should not be burdened with legal costs when launching applications against attorneys who have made themselves guilty of dishonourable, unworthy or professional conduct. A practice has therefore developed on that basis that costs are granted on an attorney and client scale. The respondent has offered to pay the costs occasioned by the postponement. We see no reason why those costs should not be ordered on an attorney and client scale. The respondent should appreciate that we afforded him an indulgence which he did not deserve. As the papers stand, the Law Society is entitled to an order of suspension against the respondent. An order of costs on an attorney and client scale is therefore justified.

[16] In the result we make the following order:

1. The application is postponed *sine die*;
2. A rule *nisi* is hereby issued, to operate with immediate effect, in terms of which the respondent, FREDERICK KYLE is suspended from practising as an attorney of this court;
3. The return date of the rule nisi is 26 May 2014 at 10h00, on which day the respondent shall show cause why the above order should not be made final;
4. The respondent may, on five (5) days' notice to the Law Society, anticipate the return date;
5. The respondent is ordered to pay the wasted costs due to the postponement on an attorney and client scale.

TM MAKGOKA
JUDGE OF THE HIGH COURT

and

ALCM LEPHOKO
ACTING JUDGE OF THE HIGH COURT

DATE HEARD : 22 APRIL 2014

JUDGMENT DELIVERED : 22 APRIL 2014

FOR THE APPLICANT : MR. J LEOTLELA

INSTRUCTED BY : ROOTH & WESSELS, PRETORIA

THE RESPONDENT IN PERSON