


IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1)REPORTABLE	YES <input checked="" type="radio"/> NO <input checked="" type="radio"/>
(2)OF INTEREST TO OTHERS JUDGES:	YES <input checked="" type="radio"/> NO <input checked="" type="radio"/>
(3)REVISED	<input checked="" type="checkbox"/>
22/10/2014	
DATE	SIGNATURE

CASE NO. 38230/2014

In the matter between:

22/10/2014

THE PRETORIA SOCIETY OF ADVOCATES

APPLICANT

and

MALALA GEOPHREY LEDWABA

RESPONDENT

JUDGMENT

BOTES, AJ

INTRODUCTION

1. The Respondent was employed by the National Prosecuting Authority of South Africa (hereinafter referred to as the “NPA”) in the capacity of Investigating Director : Directorate of Special Operations (hereinafter referred to as the “DSO”), more colloquially known as “*the Scorpions*”.
 - 1.1 The Respondent reported directly to Adv LF McCarthy, the Deputy National Director of Public Prosecutions and the National Head of the DSO.
 - 1.2 As such the Respondent was, *inter alia*, responsible for overseeing the operational aspects of the DSO nationally and ensuring that all members of the DSO complied with the policies and procedures applicable to members of the DSO and the NPA, including the policies and procedures governing the use of the DSO C-Fund.
2.
 - 2.1 DSO C-Funds are funds allocated as such out of the DSO budget, which are used only when security considerations, time lines, opportunity or other exceptional circumstances, peculiar to the collection of Court directed investigative information, prevent the use of mainstream DSO funds.
 - 2.2 DSO C-Funds expenses necessitated in the ordinary course of DSO

business and as such incurred before the DSO Head of Operations and the DSO C-Fund's Administrator have appointed a particular project may be paid out of DSO C-Funds. The C-Fund's Administrator must be informed of these expenses within two days after they incurred. The following approval levels are required for the payment of each such DSO C-Fund's expenditure:

2.2.1 More than R100 000,00 and all expenses to be incurred outside the Republic of South Africa must be approved operationally by the Head of the DSO and fiscally, by the DSO C-Fund's Administrator;

2.2.2 Between R10 000,00 and R100 000,00 must be approved operationally by the DSO Head of Operations and fiscally, by the DSO C-Fund's Administrator; and

2.2.3 Below R10 000,00 must be approved operationally by the relevant DSO Regional/Divisional Head and fiscally, by the designated DSO C-Fund's Custodian.

3. The Respondent was tried in the Regional Court for the Regional Division of Gauteng, held at Pretoria (hereinafter referred to as "*the Regional Court*"), in case no. 111/88/2010 on the charges of fraud and theft, in that he had illegally, wrongfully and unlawfully defrauded the DSO C-Fund with a substantial amount of money. The State alleged that the Respondent had

stolen certain amounts from the aforementioned Fund and 15 charges of fraud and theft were brought against him.

4. He was convicted on 5 February 2014 in the Regional Court on the following counts:

- 4.1 Count no 3 : fraud - R45 000,00;
- 4.2 Count no 4 : fraud - R150 000,00;
- 4.3 Count no 11 : theft - R193 422,20;
- 4.4 Count no 12 : theft - R165 375,98;
- 4.5 Count no 13 : theft - R110 250,65; and
- 4.6 Count no 14 : theft - R270 079,11.

Total

R934 127,94

THE URGENT PROCEEDINGS INITIATED BY THE APPLICANT

5. The Applicant is a Society of Advocates and constituent member of the General Council of the Bar, which has standing to bring applications in accordance with the provisions of Section 7(2) of the Admission of Advocates Act, No 74 of 1964 (hereinafter referred to as "*the Act*").

- 5.1 The Respondent was admitted by this Court to practice as an advocate on 15 November 1994, in case no. 20383/1994.

5.2 The Respondent is not a member of the Applicant.

6. By virtue of the fact that the Respondent had been convicted in the Regional Court of fraud and theft, the Applicant initiated an urgent application in which it applied for an order that the Respondent be interdicted from practicing as an advocate pending the final adjudication of the relief applied for in Part B of the notice of motion. The Applicant applies in Part B of the notice of motion for an order that the name of the Respondent be struck from the roll of advocates.
7. This Court issued an order on 4 July 2014 in terms of which the Respondent is interdicted from practicing as an advocate pending the final adjudication of the application to strike his name from the roll of advocates.
8. The Applicant applies, in accordance with the relief referred to and contained in Part B of the notice of motion, for an order that the Respondent's name be struck from the roll of advocates.

THE APPLICANT'S CASE

9. It is the Applicant's case that the Respondent is not a fit and proper person to continue practicing as an advocate of this Court. The Applicant submits that a person who has been convicted of fraud and theft is not a fit and proper person to practice as an advocate.

- 9.1 The Respondent committed the crimes of which he was convicted whilst he was employed by the NPA.
- 9.2 The Applicant furthermore received three complaints from members of the public, which complaints relate to monies (fees) which were paid to the Respondent directly and legal work which was allegedly not executed.
10. The following similarities are evident from the complaints received by the Applicant:
- 10.1 The Respondent represented himself as a "senior advocate" which he clearly is not;
- 10.2 The Respondent solicited briefs to conduct the complainants appeals without the intervention of an attorney;
- 10.3 The Respondent solicited substantial deposits (R24 300,00 in the case of Mr Mashiani and R18 000,00 in the case of Mr Mtholeng); and
- 10.4 The Respondent did not do the work for which he had been paid in advance.

11. The Applicant therefore came to the conclusion that the Respondent:

11.1 is clearly unfit to practice as an advocate of this Court; and

11.2 despite his conviction in the Regional Court, continues to practice as an advocate of this Court.

THE RESPONDENT'S DEFENCE

12. The Respondent admits and concedes that he was convicted in the Regional Court on the charges referred to and contained in paragraph 4 *supra*, but he furthermore submits that this application is premature by virtue of the fact that he instituted a review application which is currently pending before this Court.

12.1 He admits that a person who has been convicted of fraud and theft is not a fit and proper person to practice as an advocate of this Court.

12.2 He confirms that he was in the employ of the Department of Justice, and later in the NPA, from 1985 to 2005.

12.3 He resigned from the NPA during 2005 as a result of a "relationship fall-out" which occurred with the Head of the DSO, Adv LF McCarthy.

- 12.4 The Respondent discussed his fate with two senior counsel who advised him to institute a review application which was set down for hearing in this Court on 22 July 2014. The Respondent applied for an order that the proceedings which had been conducted in the Regional Court be reviewed and set aside. The review application dismissed with costs on 24 July 2014.
- 12.5 The Respondent applied for leave to appeal the order which had been granted by this Court on 25 July 2014, which application was dismissed with costs on 8 August 2014.
13. The Respondent relied, insofar as his fate in this application is concerned, solely on the review application. The Respondent's reliance on the outcome of the review application is based on the following evidence:
- 13.1 This application was premature by virtue of the fact that the review application which was pending before this Court (par 6.1 of the Respondent's answering affidavit);
- 13.2 The improper conduct and unethical happenings that resulted in the Respondent's conviction (as well as the pending review application) may result in the conviction being set aside on review (par 6.2 of the his answering affidavit);

- 13.3 The Applicant should have waited for the decision of the review application before it decided to apply for an order to strike the Respondent's name from the roll of advocates (par 16.14 of his answering affidavit);
- 13.4 The Respondent informed Mr Mhlongo (one of the complainants) of his conviction and that he was awaiting the result of the review application in order to have clarity in respect of his position as a legal practitioner (par 41.6 of the Respondent's answering affidavit);
- 13.5 Should the review application be unsuccessful, the Respondent accepts that it will be the end of the matter as he will then be sentenced by the Regional Court (par 42.1 of the Respondent's answering affidavit); and
- 13.6 This application should have been enrolled for hearing after the review application has been finalized (par 44 of the Respondent's answering affidavit).

THE LEGAL PRINCIPLES APPLICABLE

14. The Respondent was convicted in the Regional Court on the counts referred to in paragraph 4 *supra*.

- 14.1 The Respondent has not yet been sentenced, but the fact remains that the convictions against him stand.
- 14.2 The review application was unsuccessful and he made no effort to file any further affidavits after its dismissal.
- 14.3 This Court therefore has to adjudicate this application on the evidence and the facts which are contained in the affidavits which were filed by the parties.
15. All advocates are answerable to this Court for all matters concerning their profession and office. The Act provides that, subject to the provisions of any other law, a Court of any Division may, upon application, suspend any person from practice as an advocate or order that his name be struck off the roll of advocates in certain instances.
16. In a case against an advocate for his suspension or the removal of his name from the roll, the allegations have to be proved on a balance of probabilities. This test does not mean that it will be lightly accepted that an advocate has misconducted himself.
17. The fact that the Respondent is not a member of the Applicant is irrelevant for purposes of the relief applied for by the Applicant.

18. Proof of a conviction is *prima facie* evidence in a misconduct inquiry. See: **Prokureursorde van Transvaal v Kleynhans 1995(1) SA 839 TPA.**
19. This Court is duty bound to suspend or disbar an advocate if it is satisfied that he is not a fit and proper person to continue to practice as an advocate. See: **Section 7(1)(d) of the Act.**
20. The test is whether the Court is convinced upon a preponderance of probabilities. See: **Olivier v Die Kaapse Balieraad 1972(3) SA 485 A.**
21. An advocate, whose calling is "*one which is praiseworthy and necessary to human life*", should "*always cling to the famous principle that the true jurist is an honest man*". See: **Vereniging van Advokate van SA (Witwatersrand Afdeling) v Theunissen 1979(2) SA 218 T.**
22. An advocate may not lack the sense of responsibility, honesty and integrity which is characteristic of an advocate. Such lack may be a ground for disbarment. See: **Olivier v Die Kaapse Balieraad, supra at page 497 to 498.**
23. It is trite that there are three steps in the inquiry whether action should be taken in an application of this nature. In the case of **Malan & another v Law Society, Northern Provinces 2009(1) SA 216 SCA** the Court said, in the context of the corresponding provision of the Attorneys Act, No 53 of 1979,

relying upon what had been said to similar effect in the case of Jasat v Natal Law Society 2000(3) SA 44 (SCA):

"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 'in the discretion of the Court' is 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 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."

24. The Supreme Court of Appeal pronounced on the approach that a Court should adopt in applications of this nature as follows:

"The enquiry before a Court that is called upon to exercise its disciplinary powers is not what constitutes an appropriate punishment for a past transgression, but rather what is required for the protection of the public in the future. Some cases will require nothing less than the removal of the advocate from the roll forthwith. In other cases, where a

Court is satisfied that a period of suspension will be sufficiently corrective to avoid a recurrence, an order of suspension might suffice."

See: **Van der Berg v General Council of the Bar of SA [2007]2 ALL SA 499 SCA at par 50.**

25. As officers of our Courts lawyers and advocates play a vital role in upholding the Constitution and ensuring that our system of justice is both efficient and effective. It therefore stands to reason that absolute personal integrity and scrupulous honesty are demanded of each of them. It follows that generally a practitioner who is found to be dishonest should in the absence of exceptional circumstances expect to have his name struck from the roll.

See: **General Council of the Bar of SA v Geach & others 2013(2) SA 52 SCA at par 87.**

26. In determining whether an advocate is a fit and proper person to continue to practice, all relevant facts proved should be taken into account whether they form the subject of specific charges against the Respondent or are contained in the Respondent's answering affidavit.
27. The mere fact that the Respondent was convicted on charges of theft and fraud renders him to be not a fit and proper person to practice as an advocate of this Court.

CONCLUSION

28. I am satisfied that the Applicant has made out a proper case and that the Respondent's name should be struck from the roll of advocates.

28.1 On a proper interpretation and analysis of the affidavits which were filed in this matter, it is evident that the Respondent is not a fit and proper person to practice as an advocate of this Court.

28.2 It therefore follows that the Respondent's name should be struck from the roll of advocates.

COSTS

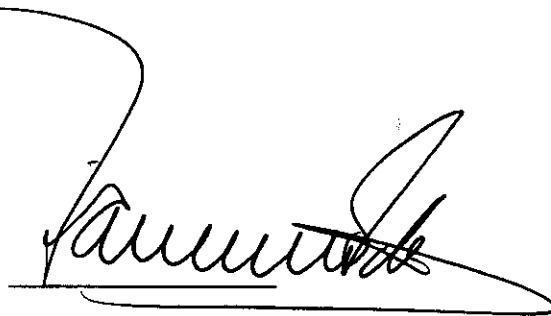
29. The Applicant has a statutory duty to approach this Court and it did not do so as an ordinary litigant. The general rule is that the Applicant, or the Law Society, is entitled to its costs, even if unsuccessful.

30. Where there is dishonesty involved in the litigation, as in this case, the appropriate scale should be that of attorney and client.

See: **Law Society, Northern Provinces v Mogami** 2010(1) SA 186
SCA at par 31.

In the premises an order in the following terms is granted:

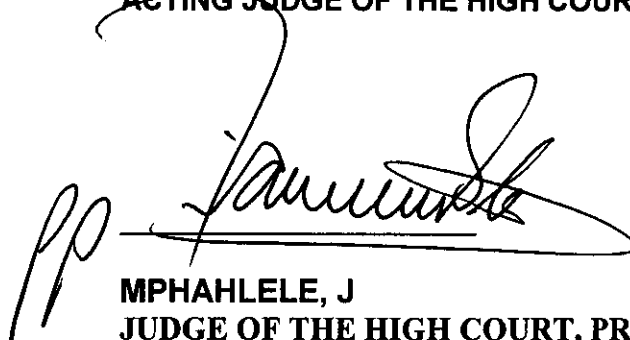
1. The name of the Respondent is struck from the roll of advocates;
2. The Respondent is ordered to surrender the original and any copies of the Court order or the certificate authorizing him to practice as an advocate to the Registrar of this Court forthwith; and
3. The Respondent is ordered to pay the costs of this application on the scale as between attorney and client, including the costs consequent upon the employment of senior counsel.



F W BOTES

ACTING JUDGE OF THE HIGH COURT, PRETORIA

I agree,


pp

MPHAHLELE, J
JUDGE OF THE HIGH COURT, PRETORIA

Appearances:

For Appellant: Adv.: Q PELSER (SC)

Instructed by: BERNHARD VAN DER HOVEN ATTORNEYS

For Respondent: Adv.: D W KEET

Instructed by: LEDWABA INC