



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 24998/2012

(1)	REPORTABLE: <input checked="" type="checkbox"/> YES / NO
(2)	OF INTEREST TO OTHER JUDGES: <input checked="" type="checkbox"/> YES / NO
(3)	REVISED.
22/3/16	
DATE	SIGNATURE

22/3/2016

In the matter between:

ERIC HILLARY LYELL

Applicant

and

THE LAW SOCIETY OF THE NORTHERN PROVINCES

Respondent

DATE OF HEARING : 08 MARCH 2016

DATE OF JUDGMENT : MARCH 2016

JUDGMENT IN RESPECT OF APPLICATION FOR LEAVE TO APPEAL

MANAMELA AJ

[1] On 08 March 2016 this judgment was reserved after hearing counsel in respect of application for leave to appeal. The applicant seeks leave to appeal the judgment handed down on 16 September 2015, in terms of which, among others, his name was struck from the roll of attorneys of this court. I authored the judgment, to which my sister, Kubushi J agreed.

[2] The applicant contends in the application for leave to appeal that we erred in our judgment, in not less than 25 grounds. However, Mr EJ Ferreira, appearing on behalf of the applicant at the hearing, approached the application from what he termed a narrow angle, comprising two grounds. The first ground is that we erred in finding that the applicant's name should be struck from the roll of attorneys (in terms of the order made in paragraph 32 a) of the judgment). The second ground of the narrow-angle approach by Mr Ferreira is that, the effect of the applicant's removal from the office of trustee of any trust (in terms of the order made in paragraph 32 e)ii) of the judgment) is that, the applicant is also precluded from being a trustee of his own family trust.¹ It is submitted that the full court of this division or the Supreme Court of Appeal may come to a different conclusion of the aforesaid.

[3] Considered in their totality, the so-called two narrowed grounds, as submitted by Mr Ferreira, are effectively still a challenge of the whole judgment save in minor respects. A majority of the other paragraphs or orders (like 32 b) to d), and f)) are consequential to the applicant's removal from the roll of attorneys in terms of paragraph 32 a). The remainder of the orders are in 32 e) and in respect of costs. In terms of the second narrowed angle, the applicant does not *per se* challenge his removal from the office of trustee of any trust, but the

¹ Paragraph 32e) ii) reads as follows: "that, the respondent [i.e. the current applicant] be and is hereby removed from the office as: ... trustee of any trust in terms of section 20(1) of the Trust Property Control Act 57 of 1988".

effect the order has on him in that he also can no longer serve as a trustee of his family trust, which he had founded.² I deal with these, after attending to some procedural issues, below.

[4] It is common cause that the application for leave to appeal was made out of time. The applicant therefore required condonation and the respondent opposed both applications for condonation and leave to appeal.

[5] In support of his application for condonation, the applicant submitted that, he was unaware of delivery of the judgment until around the end of September 2015.³ Thereafter, there were delays in acquiring the transcribed record and his interaction with counsel. The applicant submits that the respondent will suffer no prejudice due to the granting of condonation.

[6] The respondent challenged the veracity of the applicant's submissions due to absence of confirmatory affidavits from the applicant's correspondent attorneys. It is further submitted in this regard that, the acquisition of the transcribed record bears no relevance to the current application, as a written judgment was handed down.⁴ Ms S Magardie, appearing for the respondent, argued in both in written and oral submissions that, the applicant did not make any submissions regarding his prospects of success in the contemplated appeal. Regarding prejudice, she submitted that there is indeed prejudice due to the drawn-out proceedings and further costs associated therewith. However, due to the nature of the order I will propose be made in respect of the leave to appeal and consideration of the interests of justice, I will propose that condonation be granted. This is not to say that no prejudice exists

² *Ibid.*

³ See paragraphs 4 to 9 of the founding affidavit on indexed pages 14 to 16.

⁴ See paragraph 4 of the answering affidavit on indexed pages 77 to 79.

due to the delays. However, in my view, whatever prejudice there may be is capable of being remedied by an appropriate order as to costs. Mr Ferreira had actually anticipated this when he submitted that his client should be liable for the costs in the condonation application irrespective of the outcome thereof. I agree. With that I proceed to deal with the substantive issues in the application for leave to appeal.

[7] As already indicated above, the applicant contends in the main that, the order for the removal of his name from the roll of attorneys was erroneous. It is submitted in this regard that, through the removal the court visited upon the applicant the ultimate sanction. I understand this to mean that, we should have considered other possible sanctions, which we did. When we enquired from Mr Ferreira for the applicant at the hearing of this application as to other possible sanctions, he submitted that perhaps a "permanent suspension" with conditions, like never to practice again would have been appropriate. This he submitted would augur well with the fact that, the applicant had already ceased to practice of his own volition and harbours no intention to return to the profession in the future. This was labelled a "self-imposed sanction" by the applicant. There was no clear response to our enquiry that, it appears that the applicant has no real problem with the striking of his name from the roll but the potential stigma thereof. For, in my view, the so-called "permanent suspension" has the same effect as an order for removal or striking. In other words, the mitigating factors advanced by the applicant or on his behalf, do not necessarily appear to be aimed at the reduction of the sanction so that the applicant can continue practising as an attorney, but for a sanction with a different name to the current one of striking. Mr Ferreira submitted as mitigating factors which should have swayed us to impose another sanction the fact that, due to the applicant's age he is unlikely to return to practice and therefore, there is an added guarantee against any fears which the current order may have aimed to quell. Also that the

fact that the applicant had property guarantees of more than the trust deficits or that he had corrected the deficits before they were detected by the respondent or through an investigation at the behest of the respondent, should have counted in favour of a lesser sanction.

[8] On the other hand, Ms Magardie submitted that there were no prospects of success with the intended appeal. She argued that, property guarantees can never be considered back up for misappropriation of trust funds. I agree.⁵ The applicant had admitted to misappropriation of trust funds or clients' monies and therefore the so-called "self-imposed sanction" is no sanction at all, she added. There is no basis for self-removal from the roll of attorneys. She pointed out that the applicant had 40 years' worth of experience and therefore was no novice in the impugned matters. He should have known better to avoid the removal of his name from the roll.

[9] As stated above, the second ground of appeal, as submitted by Mr Ferreira, is in respect of the order in paragraph 32 e) ii) of the impugned judgment. It is submitted in this regard that the effect of this order is that the applicant is prevented from being "a trustee of his personal family trust created and funded by him personally".⁶ In other words, the applicant, has no real qualms about his removal from the office of a trustee in respect of any other trust but his self-founded family trust. This submission is new and was never made earlier despite the fact that the applicant has always been aware (at least not later than 2012) that an order for his removal from the office of trustee is sought by the respondent. Mr Ferreira agreed that the submission constituted new material. Be that as it may, I am not aware of any authority which places family trust in a different basket, so to speak, from other forms of trust. All trustees have to perform their duties or exercise their powers with the care,

⁵ See *Rheeder v Ingelyfde Wetsgenootskap van die Oranje-Vrystaat* 1972 (3) SA 502 (A).

⁶ See par 1.25 of Notice of Application for leave to appeal on indexed page 7.

diligence and skill which can be reasonably be expected of a person who manages the affairs of another.⁷ Mr Ferreira could also not furnish us with any authority for the submission. Therefore, there is no merit in the submission.

[10] When making the orders in the judgment, including those specifically targeted by the intended appeal, we approached the matter through the three-stage enquiry suggested in the decision of *Law Society of the Northern Provinces v Mogami and others*.⁸ This was despite the applicant having already admitted the transgressions levelled against him. The transgressions constituted serious offences. There was no contradiction of the evidence put forward on behalf of the respondent for the impugned judgment. As Bertelsmann J pointed out in the decision of *Law Society of the Northern Provinces v Le Roux*,⁹ a suspension allows the name of the attorney to remain on the roll and has its own consequences, including the non-disclosure by the suspended attorney to whomsoever is concerned that he or she is no longer allowed to practise as an attorney. There is no reason why an applicant should be allowed to practise when he had been found unfit and improper person to do so.¹⁰ I agree. In this matter, this is so, notwithstanding that the applicant had property guarantees to meet the trust shortages¹¹ or that by the time the offences were discovered they had already been "rectified".¹² Therefore, it is still my judgment that, the applicant's name ought not to be on the roll of attorneys and that he cannot occupy the office of a trustee.

⁷ See section (9)(1) of the Trust Property Control Act and generally Cameron E *et al* *Honore's South African Law of Trusts* 5th ed (Juta Cape Town 2002), including on page 262.

⁸ [2010] 1 All SA 315 (SCA) at para [4] on p 317. In terms of this decision, a court dealing with an application similar to this has to conduct an enquiry in three stages as follows: Firstly, the court ought to determine, on a preponderance of probabilities, whether the alleged offending conduct has been established. Secondly, the court ought to establish whether the respondent is a fit and proper person to continue to practise or not. And thirdly, whether in the circumstances, a removal from the roll or suspension from practice would be appropriate. See further *Jasat v Natal Law Society* 2000(3) SA 44 (SCA) at 51B-I; *Law Society of the Cape of Good Hope v C* 1986(1) SA 616 (A) at 637E-G.

⁹ See *Law Society of the Northern Provinces v Le Roux*, 2012 (4) SA 500 (GNP) at par [12]a).

¹⁰ *Ibid.*

¹¹ See *Rheeder v Ingelyfde Wetsgenootskap van die Oranje-Vrystaat* 1972 (3) SA 502 (A).

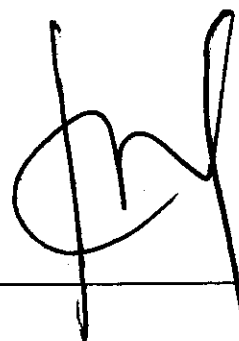
¹² See *Incorporated Law Society, Transvaal v K and another* 1963 (4) SA 631 (T).

[11] Therefore, in my view, there are no prospects of success in respect of the two narrowed grounds or any of the other grounds in the notice of application for leave to appeal.¹³ In my view, no other court would reach a different conclusion or outcome to the judgment of 16 September 2015.

[12] Under paragraph 31 of the main judgment we dealt with the basis for awarding costs on an attorney and client scale. There is no reason to deviate from imposing a costs order on a similar scale herein.¹⁴ This will be in respect of both this application and the condonation application. Consequently, the application for leave to appeal fails.

[13] Therefore, I propose that the following order be made:

- a) application for condonation for the late bringing of the application for leave to appeal is granted, but the applicant is liable to the respondent for costs hereof, on attorney and client scale;
- b) application for leave to appeal is refused, and the applicant is liable to the respondent for costs hereof, on attorney and client scale.



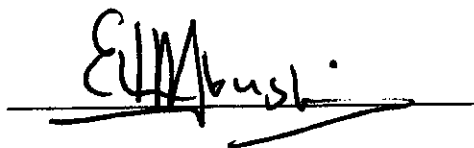
K.L.A M. MANAMELA

Acting Judge of the High Court

¹³ See indexed pages 2 to 7.

¹⁴ See *Law Society of the Northern Provinces v Dube* [2012] 4 All SA 251 (SCA) at par [33].

I agree and it is so ordered

A handwritten signature in black ink, appearing to read 'E.M. Kubushi', is written over a horizontal line.

E.M.KUBUSHI

Judge of the High Court

APPEARANCES

	:	
For the Applicant	:	Adv EJ Ferreira
Instructed by	:	Van Zyl Le Roux Inc
		Monument Park, Pretoria
For the Respondent	:	Mr S Magardie (Attorney)
		Damons Magardie Richardson
		Brooklyn, Pretoria