



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED	
DATE <u>16/08/2018</u>	SIGNATURE <u>[Signature]</u>

Case number: 67941/2015

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES

Applicant

And

LOGARAGAN PADAYACHY

Respondent

JUDGEMENT

KUMALO, AJ

INTRODUCTION

1. This an application in terms of section 22(1) of the Attorneys Act¹ brought by the Applicant, the Law Society of the Northern Provinces which is an inquiry by this Court into the question whether the Respondent is a fit and proper person to remain on the roll of attorneys of this Court.
2. The Respondent Logaragan Padayachy was admitted on 2 June 2005 by the Cape Provincial Division and enrolled by this court on 14 July 2006 and has been a practising member of the Applicant from 16 July 2012.
3. The history of this matter is arduous and dates as far back as 2015.
4. This matter was set down to be heard by this Court on 1 August 2019 being the return date of a rule nisi issued by Honourable Mokose and Mathunzi JJ on 20 June 2019.
5. The rule nisi called upon the Respondent to show cause on the return date why an order removing his name from the roll of attorneys of this court should not be confirmed.
6. Further the order called upon the Respondent to furnish an answering affidavit within 14 days of the date thereof and the applicant to respond within 7 (seven) days of receipt of the answering affidavit.
7. Before I deal with the merits of the application, I believe it is appropriate to mention at this stage that the typed order of the 20th of June 2019 had a typing error and read as follows:

"1. *Rule nisi is ordered in which the applicant must show cause on the 1st August 2019 is the return date why the order should not be confirmed (sic).*

¹ Act No. 53 of 1979 which has since been repealed. however section 116(2) of the Legal Practice Act makes provision that such proceedings are to continue and concluded as if the Attorneys Act had not been repealed

2. *The Respondent must furnish an answering affidavit within 14 (fourteen) days of dates hereof and the Applicant to respond within 7 (seven days of receipt of the answering affidavit."*
8. It is clear that the reference to the Applicant as opposed to the Respondent in paragraph 1 of the order is a typographic error.
9. As at the date of the hearing, Respondent had failed to file his answering affidavit.
10. It is therefore apposite to deal with the postponement issue that arose at the hearing of this matter and in so doing indicate that the Respondent was not present in court and had no legal representation.
11. However a man appeared and advised that he is the brother-in-law of the Respondent and handed up a copy of an email with a document that appeared to be a copy of a death certificate allegedly from the Respondent alleging that the Respondent's father passed away on 27 July 2019 and as such Respondent is not available to attend court as he is in Port Elizabeth mourning his father's passing.
12. Applicant opposed any further postponement in the matter and the court declined such further postponement for reasons that appear later in this judgement.

THE LAW SOCIETY'S COMPLAINT AGAINST THE RESPONDENT

13. The Law Society's complaint amongst others against the Respondent are as detailed herein below:
 - 13.1 Respondent did not submit the opening accountant's report to the Law Society;
 - 13.2 Respondent did not submit the accountant's report for the year ended 28 February 2014;

- 13.3 Respondent was practising without a Fidelity fund Certificate;

- 13.4 Respondent misappropriated trust funds;
- 13.5 Respondent delayed payment of trust funds;
- 13.6 Respondent failed to account to clients in respect of trust funds;
- 13.7 Respondent persistently failed and/or refused to co-operate with the Law society in a proposed inspection of his accounting records and practice affairs and refused the Law Society access to his books of accounts;
- 13.8 Respondent failed to render services of an adequate standard;
- 13.9 Respondent placed the Attorney's Fidelity fund at risk;

- 13.10 Respondent most probably failed to keep proper accounting records alternatively accounting records in respect of his practice;
- 13.11 Respondent contravened several provisions of the Attorneys Act and the Law Society rules; and
- 13.12 The Law Society received several serious complaints against the Respondent.

THE OTHER COMPLAINTS AGAINST THE RESPONDENT FROM MEMBERS OF THE PUBLIC AND OTHER LEGAL COLLEAGUES

OLD FASHIONED FISH AND CHIPS

- 14. Mr Sali of Geo Isserow & TL Friedman Inc acting on behalf of its client Old Fashioned Fish and Chips (Pty) Ltd issued two summons against Teke–Teke Enahora who was represented by the Respondent. The matter was subsequently settled between the parties on the basis that Respondent's client was to pay Old Fashioned Fish and Chips an amount of R984 079.60 in instalment.

15. Subsequent to this agreement having been concluded, Mr. Sali was unable to make contact with the Respondent, but established from a certain Mr. Lala, who apparently was an employee of the Respondent, that the first instalment of R200 000.00 had been paid into the trust account of the Respondent by his client Teke-Teke Enahora and that the money would be paid over shortly. Mr. Sali was however unable to make any further contact with either the Respondent or his employee Mr. Lala.
16. As per the processes of the Law Society, on 14 November 2014 a copy of this complaint was referred to the Respondent for his comment which comments were due on or before 5 December 2014.
17. On 4 December 2014, the Law Society received an email from the Respondent's administration assistant stating that the Respondent was sick and furnished a medical certificate with a request for an extension to respond to the allegations.
18. No response was ever provided to the Law Society and Respondent has persistently failed to refund the said amount paid into his trust account.

SCANIA SOUTH AFRICA (PTY) LTD

19. On 15 December 2014, Mrs GR Robberts acting on behalf of Scania South Africa (Pty) Ltd referred another complaint against the Respondent to the Law Society.
20. The complaint was that the Respondent had sent a court order purporting to be that of the South Gauteng Division ordering the dismissal of one Ms N Munilal to be stayed, her contract of employment to be upheld with all her benefits and that Scania is interdicted from suspending any of her medical benefits.
21. It was established that while such a court file existed, no such order was issued by the Court.
22. Again, on 16 February 2015 the Law Society referred a copy of the complaint to the Respondent for his comment on or before 16 March 2015. It is alleged that

Respondent failed to reply to the Law Society's letter and to comment on the complaint.

M. JACOBS OBO LUCIA HALGRA

23. On 8 May 2015, the Law Society received a complaint from Manfred Jacobs Attorneys on behalf of Ms. Lucia Halgrn.
24. The Respondent after giving a notice to defend on behalf of the defendant and after a trial date having been allocated failed to respond to communications from Jacobs wherein Jacobs was requesting the parties to hold pre-trial conference. Jacobs alleges that the last communication he had was an email of 20 November 2014 which email gave no information regarding the whereabouts of the Respondent.

OTHER COMPLAINTS

25. The Applicant tasked Ms. P Mapfumo to inspect and investigate the Respondent's accounting records. She could not locate the Respondent at the last known address of his practice and recommended that the matter be referred to the Disciplinary Committee of the Applicant.
26. The Applicant acting on the recommendations of Ms. P Mapfumo attempted on various occasions to summon the Respondent before its Disciplinary Committee to answer to the complaints levelled against him but to no avail.
27. On 25 August 2015, the Applicant issued an application to this court in terms of section 22(1) of the Attorneys Act for the removal of the Respondent's name from the roll of attorneys of this court.
28. On 16 October 2015, the sheriff of this court issued a return of non-service in respect of the Notice of Motion.
29. On 5 October 2016 almost a year later, the Applicant was granted leave and authorised by this Court to effect service on the Respondent by way of

substituted service by publishing the notice of motion in short form in one issue of the "Sunday Times" and the "Star" and a full notice of motion by email.

30. After the publication of the above mentioned notice of motion in the newspapers and service being effected by email, the Respondent served and filed his notice to oppose on 17 October 2016.
31. Subsequent to that, the matter was then set down for a hearing on 7 September 2017.
32. The Respondent only served his answering affidavit on 5 September 2017 outside the prescribed period without a formal condonation application. It should be noted that this was a mere two days before the hearing of the main application.
33. On 7 September 2017, this Court per the Honourable Monama and Vuma JJ issued an order suspending the Respondent from practising as an attorney of this Court, pending the removal of his name from the roll of attorneys.
34. Subsequent to that, the Respondent filed an application for leave to appeal the order referred to above. However, he failed to prosecute the said appeal and it lapsed.
35. The matter was again set down for a hearing on 30 October 2018 before the Honourable Louw and Mathunzi JJ who directed that the suspension order granted on 7 September 2017 is no longer suspended and is of full force and effect.
36. I need to state that the above order would have been necessary as the Respondent's appeal had the effect of suspending his suspension from practising as an attorney of this Court.
37. The striking off application was then postponed to 20 June 2019.
38. On 20 June 2019, this matter came before the Honourable Mokose and Mathunzi JJ and the rule nisi I referred to above was issued which rule nisi ordered the

Respondent's name to be removed from the roll of practising attorneys and the Respondent to show cause on 1st August 2019 why it should not be confirmed.

39. Counsel for the Applicant, drew this court's attention that on 20 June 2019, Respondent was not present in Court and had sent his brother-in-law with a doctor's note to request a postponement. Postponement was refused after it was established that the Respondent was not incapacitated to the extent that he could not participate in the Court proceedings and the rule nisi referred to above issued.

THE POSTPONEMENT

40. Again on 1 August 2019, the Respondent was not present before this Court. Instead a relative was sent to request a postponement.
41. In *Persadh v General Motors South Africa (Pty) Ltd*² Plasket J when dealing with an application for a postponement stated that:

"The following principles apply when a party seeks a postponement. First, as that party seeks an indulgence he or she must show good cause for the interference with his or her opponent's procedural right to proceed and with the general interest of justice in having the matter finalised; secondly, the court is entrusted with a discretion as to whether to grant or refuse a postponement were the reasons for the applicant's inability to proceed has been fully explained, where it is not a delaying tactic and where justice demands that a party should further have time for presenting his or her case; fourthly, the prejudice that the parties may or may not suffer must be considered; and fifthly, the usual rule that the party who is responsible for the postponement must pay the wasted costs."

See also *Gentiruco v firestone SA (Pty) Ltd* 1969 (3) SA 318 (T) at 320E; *Isaacs v University of the Western Cape* 1974 (2) SA 409 (C) at 411H; *Western Bank Ltd v Lester & McLean and others* 1976 (3) SA 457 (SE) at 460A and *Berger v Kotze* 1970 (4) SA 302 (W) at 305D-G.

² 2006 4 All SA 297 (SE)

42. In considering the Respondent's application for a postponement, the Court had to apply the principles enunciated above.
43. The relative advised this court that the Respondent was not available and was in Port Elizabeth as his father had passed away. He handed the court a copy an email message stating that his father passed away on 27 July 2019.
44. It is clear to this court that the Respondent must have been aware of the order of this court of 20 June 2019 calling upon him to show cause on 1 August 2019 why this court should not confirm its order removing his name from the roll of attorneys and further calling upon him to file his answering affidavit within 14 days thereof.
45. To date, the Respondent has not filed his answering affidavit as per this the order of this Court of 20 June 2019.
46. This court is obliged to consider the history of this matter and the various tactics the Respondent employed in the past to delay the finalization of this matter. According to the document handed up in Court, the father of the Respondent passed away on 27 July 2019 and the Respondent had sufficient opportunity to make a proper application for a postponement and he failed to do so.
47. Further, this Court could not ignore the fact that the Applicant opposed the granting of any further postponement and drew this Court's attention to all the dilatory methods that the Respondent had employed in the past. It is therefore this Court's conclusion that no proper case had been made for a postponement and in any event, such postponement would serve no purpose as the Court still had no version from the Respondent in so far as the merits of the Applicant's application for the removal of his name from the roll of attorneys is concerned.

GENERAL PRINCIPLES IN MATTER OF THIS NATURE

48. I now wish to consider the merits of the Applicant's application.

49. On 20 June 2019, this court issued a rule nisi calling upon the Respondent to show cause why this Court should not confirm the order of his removal from the roll of practising attorneys.
50. It is therefore clear to me that the Honourable Mokose and Mathunzi JJ must have been satisfied that *prima facie* there was a case of serious misconduct on the part of the Respondent that warranted him being struck off the roll as per the prayers of the Applicant in its notice of motion.
51. I therefore will not deal in great detail with the principles applicable in matters of this nature save for stating that these matters are *sui generis* and are of a disciplinary nature. There is no *lis* between the Applicant and the Respondent. The Applicant is the *custos morum* of the profession and merely places facts before the court for its consideration.³
52. Having read the papers and in particular the opposing affidavit of the Respondent which was filed with his misconceived application for leave to appeal an earlier order of this court suspending him from practice, It is clear to me that the Respondent lacked the understanding of the above principle.
53. His affidavit dealt with a number of points *in limine* ranging from challenging whether this matter was ripe to be heard by this court before the Applicant has exhausted its internal processes and matters pertaining to admissibility of evidence etc. The simple answer to his concerns is, the question whether an attorney is a fit and proper person in terms of section 22(1)(d) of the Attorneys Act lies in the discretion of this Court.⁴
54. As an admitted attorney, the Respondent is an officer of this Court and therefore answerable to this Court for his conduct.

³ Hassim v Incorporated Law Society of Natal, 1977(2) SA 757(A) at 767C-G, Law Society Transvaal v Matthews 1989(4) SA 389(T) @ 393E, Cirota & Another v Law Society Transvaal, 1979(1) SA 172(A) @ 187H

⁴ Law Society of the Cape of Good Hope v C, 1986(1) SA 616(A) @ 637C-E, A v Law Society of the Cape of Good Hope, 1989(1) SA 849(A) @ 851 A-E

55. The question as to whether the Applicant has a discretion to approach this Court rather than deal with the matter itself is amply addressed by the provisions of section 72(6) of the Act.⁵
56. Further, it is clear from the papers that the Respondent was called upon to present himself before the Disciplinary Committee of the Applicant and he failed to present himself before it with impunity.
57. The Applicant as the *costus morum* of the profession was obliged then to draw the attention of this Court to the conduct of the Respondent.
58. I am therefore satisfied that this Court was and is properly seized to conduct an enquiry into the conduct of the Respondent.
59. The complaints against the Respondent are indeed of a very serious nature ranging from alleged failure to account on trust monies, forged court orders, and dereliction of duties, failing to submit his audited accounts and practising without a fidelity fund certificate.
60. The principles applicable in an enquiry of this nature are well established and documented in our case law namely, the three stage enquiry.⁶
61. In summary, the Court must, (i) decide whether as a matter of fact the alleged offending conduct has been established, (ii) if it is satisfied that the conduct has been established, it must decide whether person is not a fit and a proper person to practise as an attorney and (iii) if it decides that the attorney concerned is not a fit and proper person to practise as an attorney, it must exercise its discretion whether in all circumstances of the case the attorney in question is to be removed from the roll or merely suspend him.

⁵ Section 72(6) of the Attorneys' Act 53 of 1979

⁶ See *Kaplan v Incorporated Law Society, Transvaal*, 1981 (2) SA 762 @ 782A-c, *Jasat v. Natal Law Society* 2000(3) SA 44 (SCA) @ 51 B-I, *Malan v the Law Society of the Northern Provinces* [2000] ZASCA 90 (12/09/2008) amongst others

62. The complaints against the Respondent are of a very serious nature notably the complaint relating to trust funds, the complaint relating to possible fraud and the failure to co-operate with the Applicant in these matters.
63. The facts upon which the Applicant relied for its application before this court have not been disputed by the Respondent in any form or format. This court is therefore satisfied that the offending conduct has been established.
64. Having established that the offending conduct, it is now imperative to consider the second leg of the test whether the Respondent is a "fit and proper person" to be on the roll of attorneys of this Court.
65. It is my view that the complaints of Old Fashioned Fish and Chips and Scania South Africa (Pty) Ltd amply demonstrate that the Respondent is certainly not a fit and proper person to be on the roll of the attorneys of this Court.
66. More concerning is that these complaints involve an element of dishonesty on the part of the Respondent.
67. To compound matters, on 20 June 2019 the Respondent was called upon to furnish an answering affidavit within 14 (fourteen) days of the date of the order.
68. Respondent failed to comply with this Court's order which had in effect shifted the onus on the Respondent to show cause why this Court should not confirm the rule nisi issued on 20 June 2019.
69. It is my view that the Respondent conduct in this instance is a clear demonstration of a nonchalant attitude towards these proceedings and raises further serious concerns on the Respondent's character as an officer of this Court.
70. Taking into consideration all the complaints against the Respondent and the manner in which he has conducted himself throughout these proceedings, I do not believe that a mere suspension would be adequate. The Respondent has displayed major character defects and is no longer a fit and proper person to remain on the roll of practising attorneys of this Court.

71. In the light of all the above, and the fact that there is nothing before this Court to convince it otherwise, I make the following order:

1. The rule nisi issued by the Honourable Mokose and Mathunzi JJ is hereby confirmed;
2. The Respondent's name is struck off the roll of the attorneys of this Court;
3. All ancillary relief in terms of the Applicant's Notice of motion paragraphs 2 to 12;
4. The Respondent is to pay the cost of this application on an attorney and client scale.



KUMALO

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

I, agree and it is so ordered



KOLLAPEN

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

DATE HEARD : 01 AUGUST 2019

DATE DELIVERED :

FOR THE APPLICANT : ADV CHRISTIAN JOOSTE

INSTRUCTED BY : IQBAL MAHOMED ATTORNEYS

FOR THE DEFENDANT : NO APPEARANCE

INSTRUCTED BY :
