

**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG**

**REPUBLIC OF SOUTH AFRICA**

**REPORTABLE**

Case Number: 2487/09

In the matter between:

**KWAZULU-NATAL LAW SOCIETY**

**APPLICANT**

and

**ISHANA HERENA HASSIM**

**RESPONDENT**

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**JUDGMENT**

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**GABRIEL AJ:**

1. The applicant sought an order suspending the respondent from practice as an attorney until she proves that she is a fit and proper person to practise. It did so in terms of its regulatory powers in the Attorneys Act 53 of 1979 (“the Act”) and specifically section 22(1)(d).
2. The respondent was admitted to practice in August 1995 and practiced in Pietermaritzburg. Barely three years had passed before the applicant began receiving complaints from members of the public about the respondent’s

conduct as an attorney. The respondent received repeated fines for failing to respond to the applicant about these complaints.

3. Four complaints from members of the public prompted this application. They related primarily to complaints about fees charged by the respondent and the conduct of cases. The applicant's attempts to elicit explanations and responses from the respondent failed. The fines imposed on the respondent went unpaid.
4. This led to the applicant constituting a committee to interview the respondent to determine whether she was experiencing difficulties in her practice and to caution her that continuing her course of conduct would probably result in an application to have her struck from the roll of attorneys.
5. The applicant's committee interviewed the respondent on 29 August 2006 and the respondent agreed to co-operate and undertook to make her files available for inspection. Ultimately and on 23 January 2008, only four of five required files were made available for inspection but were submitted without any accounting records. Numerous attempts to obtain further co-operation from the respondent were unsuccessful. The October 2008 report arising from the inspection recommended to the applicant's Council that the respondent be suspended from practice until such time as she has co-operated fully with the inspection committee. The applicant's Council resolved to

have the respondent suspended from practice.

6. The respondent opposed this application primarily on the basis that two of the complaints had ostensibly been withdrawn and accordingly that the applicant no longer had any reason to investigate those matters or to inspect her files. As to the absence of accounting records the respondent contended that these were not provided because they were with her auditors. Finally, the respondent contended that during 2005 to 2006 she experienced health problems which coupled with marital problems placed a strain on her ability to cope with her professional obligations.
7. There was some suggestion on the papers that the applicant's conduct was offensive and *mala fide* but Mr Choudhree who appeared together with Mr Chetty for the respondent, candidly eschewed those allegations.
8. The difficulty confronting the Court in this application is that in the absence of full and proper co-operation from the respondent the complaints against her have not been fully investigated. Even the complaints which are said to have been withdrawn appear to have been recently withdrawn; and with respect to one such complaint it is entirely unclear on the papers before us whether that complaint has in fact been withdrawn.
9. The three-fold enquiry confronting this court in an application of this nature

is well established. See *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) at paragraph 10; *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA) at paragraph 2; and *Botha and Others v Law Society, Northern Provinces* 2009 (3) SA 329 (SCA). In essence the questions are whether:

- (a) the Law Society has established the offending conduct on which it relies on a balance of probabilities;
- (b) in the Court's discretion the misconduct so established reveals that the attorney is not a fit and proper person to practice; and
- (c) where the attorney's removal from the roll is sought, whether the attorney should be struck from the roll of attorneys or whether an order suspending the attorney from practice will suffice.

10. It may be that upon a complete inspection some or all of the complaints will be adequately resolved or found to be overwhelmingly justified. This in turn will inform an assessment yet to be made of the respondent's conduct. In the absence of a comprehensive investigation the ultimate enquiry into whether the respondent is a fit and proper person to remain in practice cannot take place.
11. Matters are not assisted by the fact that the respondent has not taken the court

into her confidence. There are the vaguest allegations of ill-health and marital discord but the respondent's disciplinary record suggests problems with practice long before 2005-2006. The complaints are simply not dealt with and Mr Choudhree was constrained to concede this as well as the fact that the respondent's accounting records have never been produced.

12. Our law is clear that in matters of this nature a full disclosure is required of attorneys: *Botha, supra*, at paragraph 18. This is so if only to determine whether the offending conduct can be said to arise from a character trait unbefitting an attorney. In *Law Society of the Cape of Good Hope v Peter* 2009 (2) SA 18 (SCA), the Court was confronted with a junior attorney who had misappropriated trust funds arising from intense work-related pressure and not from a character defect unbefitting an attorney. The attorney co-operated fully with the law society and made a full disclosure to the Court. It was this that ultimately saved the attorney from being struck from the roll.

13. The fate of the attorneys in *Botha, supra*, was not as fortunate, with the Court finding that the “disgracefully cavalier” approach of the appellants was indicative of “a lack of integrity and openness” showing “no insight into the extent of their transgressions” (at paragraphs 17-23). Those attorneys received the ultimate sanction. They were struck from the roll.

14. What is disturbing about the respondent's affidavit is that she appears to

have no appreciation of the extent to which she is required to be professionally accountable. It is disturbing that an officer of this Court should behave this way. The public is at risk and the public interest demands that the respondent be held accountable.

15. In deciding what an appropriate order ought to be our law is clear that the function of a Court at this stage of the enquiry is primarily to protect the public rather than punish errant attorneys: *Botha, supra*, at paragraph 22.

16. Although the respondent sought a suspended period of suspension, Mr Choudhree ultimately conceded that the respondent ought to have co-operated with the applicant fully, has not made a full disclosure in this Court, is self-evidently having difficulty managing her practice and that any future practice must be supervised. Mr Murugasen, for the applicant, accepted that an order suspending the respondent from practice until such time as she has co-operated with the applicant and thereafter permitting the respondent to practice under supervision would meet the applicant's objectives.

17. I am of the view that an order suspending the respondent from practice until such time as she co-operates fully with the applicant, and thereafter an order prohibiting the respondent for a period of one year from practice in partnership or for her own account would balance all competing interests in this matter.

18. It may be that the investigation into the respondent yields evidence of conduct which warrants her being struck from the roll of attorneys in which case the applicant may approach this Court once again. What is clear now is that the respondent's conduct to date warrants the order proposed and the adverse costs order sought by the applicant against her.

19. For these reasons, I would propose that the following order be made.

(a) The respondent is suspended from practice until such time as she co-operates fully with the applicant's investigation into her conduct. The determination of the termination of this period of suspension shall be made by the applicant, subject to the conditions that:

(i) any dispute as to whether the suspension should be terminated shall be referred to this Court for decision;

(ii) a finding emanating from the investigation that in the applicant's opinion the respondent should be removed from the roll shall forthwith be referred to this Court for decision; and

(iii) pending the decision of this Court in either of the events set out in (i) and (ii) above the suspension imposed by this order shall remain in place.

(b) Thereafter, but subject to any contrary order which may be made by this Court in terms of paragraph (a) of this order, the respondent is precluded from

practising as an attorney for her own account, either as principal or in partnership, or as a director or member of an incorporated practice, for a period of one year from the expiry of the suspension in (a) above.

(c) Should the respondent, after the expiry of the period referred to in (b) above, elect to practise in the manner prohibited in that paragraph, she shall first satisfy the Court within the jurisdiction of which she seeks so to practise that it is appropriate that she be permitted to practise for her own account.

d) The respondent is directed to pay the applicant's costs on the attorney and client scale.

**I agree: JAPPIE J**