IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. 5112/15

In the matter between:

KWAZULU-NATAL LAW SOCIETY **APPLICANT**

and

AJAY BRIJLALL DEBBA **FIRST RESPONDENT**

FIRSTRAND BANK LIMITED **SECOND RESPONDENT**

J U D G M E N T

STEYN J

[1] Two applications served before us, a condonation application and the main application. We have considered it necessary to hear both of the applications at the same time since no useful purpose could be served by hearing them separately. The main application is an application to suspend the first respondent from practice in terms of s 22(1)(d) of the Attorneys Act 53 of 1979 (hereinafter referred to as 'the Act'). The ancillary relief is set out in the notice of motion.

[2] The first respondent, Ajay Brijlall Debba, an admitted attorney of this court practiced for his own account under the name and style A Debba and Associates. For ease of reference he shall be referred to as the respondent. There is a history to

this application. He was provisionally suspended on 16 November 2011 and on 3 December 2013, both times the suspensions were uplifted.

[3] The applicant based its application on three grounds. The first ground relates to a conveyancing transaction and the respondent's handling of same. The second ground was a complaint lodged by a client that was involved in a road accident, the complaint relates to the respondent's lack of professional conduct. The third ground is that the respondent has failed to present to the inspection committee all his books of accounts to show that the withdrawals from his trust account were justified as trust transactions.

[4] The jurisprudence as it has developed shows that applications for the suspension or removal from the roll of an attorney require a three-stage enquiry. Firstly, the court has to conduct a factual enquiry and determine whether the alleged offending conduct has been established. Secondly, it must consider whether the person concerned is in the discretion of the court a person not fit and proper to continue to practice. Thirdly, the court must enquire whether in all the circumstances the person concerned is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice.[1] Since this application concerns the suspension of the respondent, it is useful to be reminded of the general rule that finds application in matters of suspension:

> '[S]triking-off is reserved for attorneys who have acted dishonestly, while transgressions not involving dishonesty are usually visited with the lesser penalty of suspension from practice. Although this can obviously not be regarded as a rule of the Medes and the Persians, since every case must ultimately be decided on its own facts, the general approach contended for by the appellant does appear to be supported by authority (see eg *A v Law Society of the Cape of Good Hope* 1989 (1) SA 849 (A); *Reyneke v Wetsgenootskap van die Kaap die Goeie Hoop* 1994 (1) SA 359 (A); *Law Society of the Cape of Good Hope v King* 1995 (2) SA 887 (C) at 892G-894C; *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) at 538I-539A; *Law Society, Cape of Good Hope v Peter* [2006] SCA 37 (RSA) in para [19]). This distinction is not difficult to understand. The attorney's profession is an honourable profession, which demands complete honesty and integrity from its

[1] See *Law Society, Northern Provinces v Mogami & others* 2010 (1) SA 186 (SCA) para 4. Cf. *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T); *Cirota & another v Law Society, Transvaal* 1979 (1) SA 172 (A).

members. In consequence dishonesty is generally regarded as excluding the lesser stricture of suspension from practice, while the same can usually not be said of contraventions of a different kind.'[2]

[5] What follows is a short summary of the various complaints:

(a) Pregalathan complaint:

Mr Pregalathan lodged a complaint with the KwaZulu-Natal Law Society, the applicant, pursuant to him signing an agreement of purchase and sale of a property and paying the sum of R120 000 therefor. Having inspected the property he agreed to pay a deposit of R10 000 to the seller on 10 August 2013. On 20 August 2013 Mr Pregalathan conducted a deed's search and discovered that the purchased property did not belong to the seller but was registered in the name of the Municipality. He ascertained from the seller that she only received R10 000 and not the balance of R110 000. It was established that the monies paid to the respondent in his trust account was released prior to registration of transfer. Once Mr Pragalathan discovered that the property was not registered in the name of the seller he lodged a complaint of fraud with the South African Police Service.

(b) Sampath complaint

Mr R Sampath is a client of the respondent and was involved in an accident thirteen years ago. His complaint is contained in an affidavit attached to the founding affidavit marked "PDAM25". In the main he is complaining of the delay in finalising his case and that he did not receive any progress reports from the respondent.

(c) Inspection Report

The applicant has elected to file a report compiled by Messrs O'Connell and Badal issued in terms of s 70 of the Act. The purpose of the

[2] See *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA) para 21.

> inspection was to hold an enquiry into the respondent's conduct in terms of s 71 and it related to the first complainant's transaction. The report very clearly stipulates that the inspection was adjourned to the offices of the respondent. The report is incomplete and does not show that the respondent was asked for his trust account documents or that he had failed to co-operate. An attempt was made to submit an affidavit of one of the inspectors in the reply. I shall deal with the reply later in this judgment.

[6] The respondent in his opposing affidavit states that he was made aware of the complaint of Mr Pragalathan only when the papers of this application were served on him. According to him the cause of complaint no longer exists. Twenty months had lapsed since the complaint and long before he was aware of the Pragalathan complaint it was amicably resolved. He denied that the report that was attached to the founding affidavit was factually correct. As for the complaint of Mr Sampath, he disclosed that the complainant is a client of his and he instituted an action against the Road Accident Fund. The pleadings have closed and the Road Accident Fund has shown a willingness to settle the matter provided that it is furnished with expert reports which includes a report from the orthopaedic surgeon, neurosurgeon, occupational therapist and an actuary report. Mr Sampath insisted that he should pay for the medical-legal reports and failed to understand that as much as he was willing to carry the fees, he was not prepared to finance the disbursement. The respondent denied that Sampath was not given progress reports. He accordingly denied any unprofessional conduct.

[7] I consider it necessary for reasons that will follow later in this judgment to quote from Annexure "AD1" attached to the answering affidavit filed by the first respondent:

> 'This matter was set down for hearing on the 28th day of May 2015. Counsel has looked very carefully at the matter and has prepared our opposing affidavits which we intend to file tomorrow. We bring to your attention that the affidavit upon which your clients rely is entirely hearsay and that no case has been made out for the relief which the Applicant seeks in paragraphs 1(a), (b), (c) and (d) of the Notice of Motion.

> We respectfully hold the view that the most appropriate course of action is for the Applicant to withdraw the application and to pay our clients costs. For a variety of reasons the launch of the current application was not appropriate inasmuch as:
> (a) the affidavit of Samlan Pragalathan is dated the 11th of October 2013 nearly twenty months ago. The cause of the complaint no longer exists;
> (b) our client was never called upon to respond to Mr Pragalathan's complaint and had sight of the complaint for the first time when the papers in this application was served upon him;
> (c) our client wrote to your client raising certain enquiries in relation to the complaint of Vickash Ramchander Sampath which were never responded to. How could your client in these circumstances proceed to court to claim the relief set out in paragraph 1.1(b) of the Notice of Motion?' (My emphasis.)

[8] After the opposing affidavit was filed the matter was adjourned on 11 June 2015 to 30 July 2015 and the applicant was put on terms to file its replying affidavit by 16 July 2015. On 28 July 2015 the applicant served its replying affidavit. This replying affidavit created a procedural conundrum for the applicant. Firstly, it failed to adhere to the terms of the order dated 11 June 2015 and secondly, it was irregular.

[9] The general rule which is well established is that the applicant ought to make his case in the founding affidavit and not in the reply. It is a basic requirement that the relief sought has to be supported by the facts as set out in the founding affidavit.

[10] In *Hano Trading CC v JR 209 Investments (Pty) Ltd & another,*[3] the court held that the filing of supplementary affidavits must be with the leave of the court and will be admitted at its discretion. I am mindful of the view of Slomowitz AJ, as he then was, in *Khunou & others v M Fihrer & Son (Pty) Ltd & others*[4] at 355G to 356C:

> 'The proper function of a Court is to try disputes between litigants who have real grievances and so see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence, of society is inextricably interwoven. The Rules of Court are in a sense merely a refinement of the general rules of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues which I have mentioned are clarified and tried in a just manner.

[3] 2013 (1) SA 161 (SCA).
[4] 1982 (3) SA 353 (W).

> Of course the Rules of Court, like any set of rules, cannot in their very nature provide for every procedural situation that arises. They are not exhaustive and moreover are sometimes not appropriate to specific cases. Accordingly the Superior Courts retain an inherent power exercisable within certain limits to regulate their own procedure and adapt it, and, if needs be, the Rules of Court, according to the circumstances. This power is enshrined in s 43 of the Supreme Court Act 59 of 1959.
> It follows that the principles of adjectival law, whether expressed in the Rules of Court or otherwise, are necessarily flexible. Unfortunately this concomitant brings in its train the opportunity for unscrupulous litigants and those who would wish to delay or deny justice to so manipulate the Courts' procedures that their true purpose is frustrated. Courts must be ever vigilant against this and other types of abuse. What is more important is that the Court's officers, and especially its attorneys, have an equally sacred duty. Whatever the temptation or provocation, they must not lend themselves to the propagation of this evil, and so allow the administration of justice to fall into disrepute. Nothing less is expected of them, and if they do not measure up a Court will mark its disapproval either by an appropriate order as to costs against the defaulting practitioner or, in a proper case, by referring the matter to the Law Society for disciplinary action.'

[11] Mr Chetty, for the applicant, in his oral submissions conceded that the applicant ought to have sought the court's permission to file a further set of affidavits attached to the replying affidavit. He also conceded that it was irregular to try and make out a case in the replying affidavit. He further conceded that the applicant was made aware of the procedural irregularities in the process followed but nevertheless persisted with the suspension application. In fact, the odds were entirely against the applicant and the concession was rightly made that the applicant had failed to make out a *prima facie* case in its founding affidavit.

[12] It was evident that the applicant is empowered by the Act to do a proper investigation into the conduct of the respondent. In fact, s 71 of the Act gives the counsel of the applicant the power to enquire into cases of alleged misconduct on the part of the attorney, notary or conveyancer whose name has been placed on the roll of any court within its province. Section 72(6) of the Act provides:

> 'The provisions of this section shall not affect the power of –
> (a) a society to apply in terms of the provisions of this Act for the suspension from practice or the striking from the roll of any practitioner against whom an enquiry is being or has been conducted in terms of this Act in respect of the conduct which forms or formed the subject matter of such enquiry;
> (b) a competent court, at the instance of the society concerned, to suspend any practitioner from practice or to strike him or her from the roll.'

Had the applicant followed the route of an enquiry, the respondent would have responded to the complaints and the applicant would have been in a position to make out a case in its founding affidavit.

[13] The founding affidavit is defective in that it fails to make out a case against the respondent and it is riddled with hearsay evidence. I align myself with the view of Broome J in *Poseidon Ships Agencies (Pty) Ltd v African Coaling and Exporting Co (Durban) (Pty) Ltd & another*[5] and consider it good law:

> 'But none of these cases go the length of permitting an applicant to make a case in reply when no case at all was made out in the original application. None is authority for the proposition that a totally defective application can be rectified in reply. In my view it is essential for applicant to make out a *prima facie* case in its founding affidavit.'[6] (My emphasis.)

[14] In my view the founding affidavit filed by the applicant is hopelessly flawed in the respect that it fails to disclose the cause of action that entitles the applicant to the relief sought. The affidavit does not show that the respondent was furnished with the complaints lodged against him and that he was called upon to respond to the complaints and that he had failed to do so. In addition, the founding affidavit does not allege that the books of account were demanded for inspection by the inspection committee and that the respondent had failed to comply with the request of the inspection committee. In fact the report demonstrates that those tasked with the inspection had failed to finalise the inspection.

[15] Mr Chetty has conceded that the replying affidavit was filed out of time due to the fact that the applicant encountered problems in obtaining the further affidavits from the relevant complainants. In light of his earlier concession that none of those affidavits should have been filed without the permission of the court leads to the irresistible conclusion that no good cause has been shown by the applicant for not adhering to the order of 11 June 2015. I am not persuaded on the papers that condonation should be granted and accordingly, the matter is decided without

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[5] 1980 (1) SA 313 (D). Also see *Kleynhans v van der Westhuizen NO* 1970 (1) SA 565 (O).
[6] *Ibid* at 315 to 316A.

consideration of those affidavits that were filed without permission of this court.[7] To condone such late filing would mean that this court is condoning an irregular step without a justifiable reason.

[16] What is disconcerting is that the applicant as the upper guardian of the ethics of the law profession would demonstrate such disregard for the Uniform Rules of Court. Moreover, the applicant as the *custos morum*[8] of the legal profession practicing at the side Bar should at all times set an example, especially in instances where it acts as the regulatory body of the law profession.[9] This court is very much aware of its duty to the public at large to protect them from professionals who do not act with the utmost integrity and respect for their strict ethical code. It is necessary with the aforesaid in mind that it is expected of the applicant to have acted with due process and fairness in regulating the conduct of the respondent. There has been an inordinate delay in investigating the conduct of the respondent and conducting an enquiry in terms of the Act. Had the applicant followed an internal enquiry then sufficient information could have been collected to bring an application for the respondent's suspension.

[17] The application is procedurally flawed. The founding affidavit fails to make out a case for the relief sought. The applicant has not succeeded in its burden of proof and accordingly the application fails.

[18] This brings me to the issue of costs. Mr Chetty has asked that the applicant not be penalised for fulfilling its obligation as a regulatory body. Mr Aboobaker SC has asked that this court impose a punative costs order for the following reasons:

(i) The applicant has brought a wholly deficient case before court;

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[7] The affidavits attached to the replying affidavit are struck from the record.
[8] See *Law Society of the Cape of Good Hope v King* 1995 (2) SA 887 (C) at 898E-G.
[9] See generally *Hassim (Also known as Essack) v Incorporated Law Society of Natal* 1977 (2) SA 757 (A), *Cirota & another v Law Society, Transvaal* 1979 (1) SA 172 (A) at 187H.

(ii) It has acted precipitately without having regard to its own rules and the provision of ss 70 and 71 of the Act;

(iii) The applicant was forewarned of the difficulties associated with the application and persisted nonetheless;

(iv) There has been gross incompetence on the part of the Law Society.

[19] I have carefully considered the reasons listed by Mr Aboobaker and am of the view that the applicant has been penalised in that the court has disallowed those affidavits, filed without the necessary permission of the court. To order a punative costs order in these circumstances would result in the applicant being penalised twice for the same mistake. For this very reason I consider it unnecessary to make a separate costs order regarding the condonation application. Both applications are so intertwined that it cannot be separated from each other.

[20] In my view the costs order should follow the result.

[21] Order

(a) The application for condonation is refused.

(b) The application for the suspension of the first respondent is dismissed with costs, such costs to include the costs of two counsel where so employed.

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STEYN J

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MNGOMEZULU AJ

Application heard on :	30 March 2016
Counsel for the applicant :	Mr S Chetty
Instructed by :	Siva Chetty & Company
Counsel for the respondent :	Mr TN Aboobaker SC/Mr EH Tugh
Instructed by :	June Debba & Associates
Judgment handed down on :	25 April 2016