



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

CASE NO: 9327/2013

In the matter between:

KWAZULU-NATAL LAW SOCIETY

Applicant

and

MBONGENI FREDERICK MATHE

Respondent

JUDGMENT

Delivered: 31 October 2018

MBATHA J (Jappie JP concurring)

[1] The applicant seeks an order for the striking off of the name of the respondent from the roll of attorneys, that he be interdicted and restrained from practicing and / or holding himself out as an attorney of this court, whilst his name is so struck off from the roll of attorneys, that he surrenders and delivers to the Registrar of this Court the Certificate of Enrolment as an attorney of this court and that the respondent pay the costs of this application on an attorney and client scale. The relief sought by the applicant is opposed by the respondent.

[2] The background to this application is as follows: The respondent was admitted and enrolled as an attorney in the High Court, KwaZulu-Natal Division on 26 November 2004 as a non-practicing attorney in terms of section 15 of the Attorneys Act 53 of 1979 (the Act). Subsequently thereafter the charges for fraud, alternatively theft, were laid against the respondent and he was convicted in the Regional Court, Durban, under case number 41/02368/2005 for theft of R11 000.

[3] On 4 May 2007 he was sentenced to three years imprisonment. The court further ordered that he could be placed under correctional supervision in terms of section 276(1)(i) of the Criminal Procedure Act (the CPA), directing that a period of one year imprisonment be suspended for a period of one year on condition that the respondent compensates the complainants in terms of section 297 of the CPA.

[4] The respondent appealed against his conviction and sentence to the High Court KwaZulu-Natal Division, Pietermaritzburg under case number AR100/2010. On 30 April 2013 the appeal court confirmed the conviction of theft, but reduced the amount from R11 000 to R10 000. The appeal against sentence succeeded to the extent that the sentence was set aside and altered to read that 'the accused is sentenced to 3 (three) years imprisonment, 1 (one) year of which is suspended on condition that the accused repays the sum of R10 000.00 to the complainants within the period of suspension in terms of section 297 of Act 51 of 1977. The provisions of section 276(1)(i) shall apply to the terms of imprisonment imposed.' The sentence was antedated to 15 June 2007.

[5] The theft charges arose when the respondent was employed as a magistrate in the Pinetown Magistrates' Court, where he handled the affairs in the Estate Late Sikhumbuzo Emmanuel Ndlovu. An estate enquiry was held, where the deceased's mother, Cynthia Jili (Jili), the deceased's sister, and the representatives of the deceased's minor children (their mothers) appeared before him. At this enquiry he directed Jili to withdraw the invested funds in the sum of R15 000 for purposes of distribution to the beneficiaries of the estate. On 13 January 2003, Jili handed over the sum of R15 000 to the respondent. He distributed the sum of R5 000 to the

representatives of the deceased's minor children and kept R10 000. He informed the deceased's relatives and the mothers of the minor children that he will deposit the sum of R10 000 at the cash hall at the Pinetown Magistrates' Court, where it will be invested for the benefit of the deceased's minor children. When the minor's representatives and Jili sought maintenance from the said funds, it transpired that no funds were ever deposited by the respondent at the cash hall or elsewhere. The respondent made several promises to repay the funds, but failed to do so. The Hawks were approached by the beneficiaries of the estate, which finally led to his arrest, trial and conviction. The respondent's defence at the time of the trial was that he had instructed a clerk by the name of Zondi to deposit the sum of R10 000 at the cash hall, was rejected by both the Regional Court and the Full Bench of the High Court, sitting as a court of appeal.

[6] On the basis of this conviction and sentence the applicant submitted that the respondent is not a fit and proper person to remain on the roll of attorneys. This submission by the applicant is made against the assertions by the respondent that he has petitioned the Supreme Court of Appeal to further appeal his conviction and sentence. The applicant rejected that assertion as the conviction and sentence has not been set aside since the dismissal of his appeal by this court.

[7] The respondent's main contention in opposing the application was that the misconduct which formed the basis of the application was committed before he was admitted and enrolled as an attorney, that the applicant has failed to conduct an enquiry into his conduct in line with rule 50.6.2.1 or rule 50.6.2.2,¹ i.e. to call upon him to appear before an enquiry to determine his misconduct, and that there is a pending petition before the Supreme Court of Appeal in terms of section 18(5) of the Superior Courts' Act, 10 of 2013. Therefore the application before the court is premature. In the light of the foregoing it was submitted that misconduct on the part of the respondent has not been established.

¹ Attorneys' Act (53/1979): Rules for Attorneys' Profession, *Government Gazette* 39740, dated 26 February 2016.

[8] The application was brought in terms of section 22(1)(d) of the Act which provides that:

'22(1) Any person who has been admitted and enrolled as an attorney may on application by the society concerned be struck off the roll or suspended from practice by the court within the jurisdiction of which he practises -

.....

(d) if he, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney.'

According to *Jasat v Natal Law Society*,² the court held that section 22(1)(d) envisages a three stage enquiry. The court must consider: first, whether the alleged offending conduct has been established on a balance of probabilities which is a factual enquiry; secondly, whether the person concerned, in the discretion of the court, is not a fit and proper person to continue to practice; and thirdly, the court must inquire whether in all circumstances the person in question is to be removed from the roll of attorneys or whether an order suspending him from practice for a specified period would suffice.

[9] It is trite that such proceedings are *sui generis* in nature as they involve a disciplinary element at the same time, involve the weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, is a value judgment. It is required that the applicant as the *custos moraes* of the legal profession has to gather the facts which it considers serious enough for a strike off or suspension and place them before the court to exercise its discretion. The main focus should be for the protection of the public.³

[10] In dealing with the first requirement as set out in *Jasat* the conduct of the respondent, which is the basis of the application before this court, arises from the following facts which are: The respondent was admitted as a non-practicing attorney on 26 November 2004, was convicted of theft on 4 May 2007 and his conviction and sentence were confirmed by the Full Bench of this Division on 30 April 2013. It is common cause that all these undisputed facts occurred after his enrolment and

² 2000 (3) SA 44 (SCA).

³ *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA).

admission as an attorney. The date of the theft of the funds is immaterial as it falls outside the period of his admission as an attorney. The conviction and sentence which falls post his admission still stands. The court was informed from the bar that he did not disclose that he was being investigated for criminal charges before his admission, which was not disputed by counsel for the respondent.

[11] In consideration of whether he is a fit and proper person, I have considered various authorities including the judgment in *Kaplan v Incorporated Law Society Transvaal*,⁴ which aptly described the expression 'fit and proper person' to relate to the personal qualities of the applicant. This can only mean that consideration should be given to the nature of the misconduct committed and whether the respondent lacks the qualities of an attorney. Theft is an act of dishonesty. The theft in this case was committed against three minor children who were deprived of the very little inheritance that their father left for them. The respondent was then employed as a magistrate, who had no reason to steal from the poor people. His conduct had severe repercussions for the family. Jili suffered a stroke whilst giving evidence in court in the trial of the respondent. This is an indication of stress that was borne by the family. This kind of conduct is not required in the profession which requires honest and high moral standards. This court finds the respondent's conduct to be at odds with what is expected from an attorney whether practicing or non-practicing.

[12] The judgment on appeal was handed down on 30 April 2013, five years later the respondent is still asserting that he is pursuing a petition for leave to appeal to the Supreme Court of Appeal. The time frame for such a process was twenty one days from the date of judgment in terms of the Supreme Court Act and thirty days in terms of the Superior Courts Act. The respondent has kept the applicant waiting for over five years. It was only at the enquiry of the attorneys of record for the applicant, that the applicant received a letter dated 15 June 2018 from the Registrar of the Supreme Court of Appeal stating that it appears that there is no such case registered and pending at the Supreme Court of Appeal. Pursuant to this revelation the respondent filed an additional affidavit to this application stating that he has briefed

⁴ 1981 (2) SA 762 (T) at 783G-H.

counsel as of 6 July 2018 to re-instate his petition to the Supreme Court of Appeal. It is clear to me that the respondent was resting on his laurels, as the delay did not only afford him an opportunity to remain on the roll of attorneys, but also kept him away from the prison doors. I accept that section 18(3) of the Superior Courts' Act automatically suspends the operation of a court order. However, the court can enforce the operation of the order in exceptional circumstances in terms of section 18(1) of the Superior Courts' Act. Corbett JA described the test in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*,⁵ the main consideration being whether it is just and equitable in all circumstances. The petition has been pending since 2013, five years later it has not been prosecuted. The respondent has not taken this court into his confidence, about the reasonable prospects of success of his petition to the Supreme Court of Appeal, which may persuade the Supreme Court of Appeal to grant condonation for filing the petition after five years. I am inclined to accept that this is dilatory and opportunistic conduct on the part of the respondent.

[13] As to the challenge by the respondent that an enquiry ought to have preceded the application before us, I refer to the provisions of section 71(1) of the Act which provides as follows:

'(1) A council may in the prescribed manner inquire into cases of alleged unprofessional or dishonourable or unworthy conduct or contravention of any law repealed by section 35 of the Attorneys Amendment Act, 2014, on the part of or by any attorney, notary or conveyancer whose name has been placed on the roll of any court within the area of jurisdiction of its society, whether or not he or she is a member of such society, or of any person serving articles of clerkship or a contract of service with a member of its society, or of any former candidate attorney referred to in section 8(4).'

The new rule 50.6.2, referred to by the respondent state that 'where it is of the opinion [of the Council] that a *prima facie* case of unprofessional or dishonourable or unworthy conduct on the part of the member concerned is or may be made out', an enquiry may be held to explain, elucidate or discuss the matter.⁶

⁵ 1977 (3) SA 534 (A) at 544H-546B.

⁶ Attorneys' Act (53/1979): Rules for Attorneys' Profession, *Government Gazette* 39740, dated 26 February 2016.

[14] In the case of the respondent, I find that there is no *prima facie* case to be answered by him. His conduct has already been determined by the Regional Court and the Full Bench of the High Court. The new rule and the old section refer to matters of conduct, where the member concerned has to answer to unproven allegations against him not where a court of law has already determined the merits of a misconduct on a standard beyond a reasonable doubt. There is nothing to be determined by an enquiry in the respondent's case as his conduct has been fully determined by the courts, hence the application before the court.

[15] Lastly, in the exercise of the court's discretion whether the respondent is a fit and proper person to practice as an attorney and whether his conduct requires to be sanctioned by a strike off or a suspension, I have taken into account the objectives of the law society in section 58, amongst others being: to maintain and enhance the prestige, status and dignity of the profession; to regulate the exercise of the profession; to encourage and promote efficiency and responsibility in relation to the profession; to deal with all matters relating to the interest of the profession and to protect those interests; to uphold the integrity of the profession. I have also taken into account the nature of the misconduct, which is gross and that the public needs to be protected from persons like the respondent who abuse their positions of trust. The court, as stated in *Malan & another v Law Society, Northern Provinces*,⁷ has exercised its discretion, which involves a value judgment in determining whether the respondent should be removed from the roll of attorneys or not. In that regard I find in favour of the applicant.

[16] Accordingly, I propose the following order:

- (a) That the respondent's name, Mbongeni Frederick Mathe, be struck off from the roll of attorneys of this Honourable Court and that the respondent be and is hereby interdicted and restrained from practising and / or holding himself out as an attorney of this Honourable Court whilst the respondent's name is so struck off the roll.

⁷ 2009 (1) SA 216 (SCA) para (4).

- (b) That the respondent be and is hereby ordered to surrender and deliver to the Registrar of this Court his Certificate of Enrolment as an attorney.
- (c) That the respondent pays the costs of this application on an attorney and client scale.

MBATHA J

JAPPIE JP

Date of hearing : 19 October 2018
Date delivered : 31 October 2018

Appearances:

For the Appellant : Mr SN Chetty
Instructed by : Messrs Siva Chetty & Co
378 Langalibalele Street
Pietermaritzburg

For the Respondent : Mr S Mhlanga
Instructed by : Mhlanga Inc
407 Anton Lembede Street
Durban