IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO.: 9183/2010

In the matter between

THE CAPE BAR COUNCIL Applicant

and

MOGAMAT FAREED STEMMET Respondent

JUDGMENT DELIVERED ON 1 MARCH 2012

SAMELA, J

Introduction

[1] In this application, the Applicant seeks an order striking the Respondent off the roll of advocates, alternatively suspending him from practice for a period to be determined by this court. The order is sought in terms of section 7(1) (d) of the Admission of Advocates Act 74 of 1964 ("the Act") which provides:

> "Subject to the provisions of any other law, a court of any division may, upon application, suspend any person from practice as an advocate or order that the name of any person be struck off the roll of advocates-
>
> (a) If the court is satisfied that he is not a fit and proper person to continue to practice as an advocate.

Facts

[2] On 26 August 2011 there were two applications before court, namely, the condonation application and the main application. I will firstly deal with the condonation application, and thereafter with the main application.

[3] The application was initially set down for 11 March 2011. The Respondent did not file papers before that date as the parties proposed an agreement in respect of the sanction to be imposed on the Respondent. The court found the proposed consent order unacceptable. The matter was postponed to 15 April 2011 to enable the Respondent to file a supplementary affidavit dealing with certain issues. The Respondent failed to file his papers timeously. His failure caused a further postponement to 13 May 2011. The Respondent only filed his answering affidavit during the course of the afternoon on the 11 May 2011, that is two days before the hearing of the matter. The Applicant required some time to consider the Respondent's affidavit and to decide whether to file replying papers. The matter was further postponed to 26 August 2011.

[4] The Applicant submitted that the Respondent failed to make out a proper case for condonation on two occasions, namely his failure to file answering papers before 15 April 2011 and again his failure to file such papers timeously for the hearing of this matter on 13 May 2011.

[5] The Applicant further submitted that regarding the first mentioned occasion the Respondent failed to explain his failure to file timeously, and therefore a good cause for condonation had not been shown. Regarding the second failure the Respondent furnished three reasons, namely:

(a) his financial inability after 15 April 2011 to place his legal representatives in sufficient funds;
(b) his mayoral duties of the Eden District Municipality which did not allow him the opportunity to finalise timeously his answering affidavit prepared by his legal representatives; and
(c) unsuccessful attempts to establish from his bank that Kruger & Co. law firm was a beneficiary on his account.

[6] The Applicant pointed out that the Respondent's explanation was hopelessly unconvincing and unacceptable for the following reasons:

(i) the Respondent was earning a substantial salary (as a Mayor) at the time. He was furnished with a draft affidavit on 12 April 2011, that is before his financial difficulties set in (namely after 15 April 2011);

(ii) it was not feasible that the Respondent's duties as Mayor could have restrained him for a month to finalise a mere 20 pages affidavit; and

(iii) his alleged futile attempts to get confirmation from his bank should not have forestalled him from filing his answering affidavit.

The Applicant submitted that the true reason for the Respondent's failures was that he was not viewing his transgressions and the Applicant's application in a serious light.

[7] The Respondent was unable to give any explanation regarding his first failure. In respect of his second failure, he submitted that the 15 April 2011 court order did not specify a date for filing his affidavit. However he accepted his failure to file his affidavit within a reasonable time before a hearing date.

[8] The Respondent acknowledged that his belated filing of his affidavit caused inconvenience to both the court and the Applicant. He apologised unreservedly for the inconvenience caused by his tardiness. He tendered the wasted costs occasioned by the various postponements.

[9] The Respondent further submitted that his delay in filing his affidavit did not reflect a lack of appreciation for the seriousness of the proceedings.

[10] After hearing counsel for the Applicant and Respondent, the court decided to grant condonation.

[11] The main application was brought on the basis that the Respondent acted in an unprofessional manner, dishonestly, and in a manner unbecoming of an advocate. Consequently, he is not a fit and proper person to continue to practice as an advocate. Alternatively the court was asked to suspend the Respondent from practice as an advocate for a period to be determined by the court.

[12] The Respondent was admitted to practice as an advocate of this court on 7 September 2007. He is not a member of the Applicant nor of any Society of Advocates under the General Council of the Bar of South Africa. He practises as an advocate around George areas. The Applicant sought an order striking him off the roll of Advocates,

alternatively suspending him from practice for a period to be determined by this court.

[13] There is a dispute between the parties regarding the occurrence of the incidents. In my view nothing turns on this issue as both parties are in agreement that the incidents giving rise to these proceedings did in fact occur.

[14] It is alleged by the Applicant that there are three (3) acts of misconduct by the Respondent, namely the Paradise complaint, the Booysen complaint, and the undisclosed double briefing complaints.

(i) The Paradise Complaint

[15] Regarding the Paradise complaint, the Applicant alleged that the Respondent held a consultation (at the Alpine Restaurant) with one Mrs Paradise which was arranged. No instructing attorney was involved. At this meeting the Respondent accepted an instruction to recover from one Rose the proceeds of a golf cart sold to him by Mrs Paradise. Upon accepting the instruction the Respondent required and was paid a deposit of R10 000.00. The Respondent also undertook to write a letter of demand which was apparently delivered to Rose. Although the Respondent some two weeks later procured the involvement of attorney Krüger, the deposit was never transferred to Mr Krüger's trust account. No further steps were taken to recover the money from Rose. After several failed attempts to make contact with the Respondent telephonically, Mrs Paradise, (who had in the meantime emigrated to England), with the sole purpose of recovering her money, returned to South Africa. Upon confronting the Respondent personally, the deposit was repaid to her. This conduct on the part of the Respondent amounted to a contravention of the rules governing the conduct of advocates and a contravention of section 83(10) of the Attorney's Act, No. 53 of 1979.

[16] The Respondent admitted that the acceptance of the deposit from Mrs Paradise was contrary to his ethical obligations. However, he attempted to justify his actions by the following explanation:

(a) that he communicated with Mr Krüger prior to the meeting with Mrs Paradise and arranged the consultation (at the Alpine Restaurant) with the knowledge and co-operation of Mr Krüger;

(b) that Mr Krüger was unable to attend the consultation because of problems with his motor vehicle, and suggested that the consultation be proceeded with in his absence;

(c) that he asked for a deposit of R10 000.00 because he knew from his experience of working with Mr Krüger that the latter usually required a deposit in that amount;

(d) that Mr Krüger instructed him to deposit the money into his (the Respondent's) account and to electronically transfer the money over to Mr Krüger

(e) that Mr Krüger instructed him to arrange a further consultation;

(f) that Mr Krüger issued a letter of demand and after receipt of the response thereto, told the Respondent that he was issuing summons;

(g) that the Respondent on the instructions of Mr Krüger (by implication) prepared a draft letter of demand which he sent to Mr Rose;

(h) that Mr Krüger informed him that Mrs Paradise was phoning him constantly;

(i) that Mr Krüger was at some stage nct contactable due to the demise of his son;

(j) that Mr Krüger instructed him to pay the money back to Mrs Paradise and that Mr Krüger said that he would "write off" the work that he had already done;

(k) that he went to his bank during February 2009 to set up Mr Krüger's bank account as a beneficiary on his account.

[17] The above allegations were denied by Mr Krüger, whom the Respondent by his own admissions described his working relationship between them as being good.

(ii) <u>The Booysen Complaint</u>

[18] The complaint was that during 2008 the Respondent was briefed by attorneys Scholtz Beddy and Partners to represent one Booysen in the George Regional Court on a charge of culpable homicide. After three court appearances by the Respondent, the matter was enrolled for trial

on 5 February 2009. The State was on that day ready to proceed to trial. However, when the Respondent arrived at court that morning, he informed the prosecutor that the attorneys instructed him to withdraw from the matter the previous day. It is alleged that this statement was untrue as the Respondent was already on 30 July 2008 instructed to withdraw from the matter. When the magistrate pursuant to an investigation in accordance with section 342 A of Act 51 of 1977 asked the Respondent for an explanation and he repeated the untruth.

[19] The Respondent submitted that he was only on 4 February 2009 instructed to withdraw from the case. This allegation is gainsaid by deponent Ms Murray, whose affidavit formed part of the section 342A investigation.

[20] Ms Murray in her affidavit stated that she was serving articles of clerkship with Booysen's attorneys of record. It was clear from the contents of her affidavit that the facts therein contained, and particularly the dates, were obtained from contemporaneous notes made on her file in the Booysen matter. Her version was furthermore corroborated by her letter to Booysen on 30 July 2008 that her firm was withdrawing as attorneys of record and the affidavit of Buys who confirmed that Murray told her that she on 30 July 2008 instructed the Respondent to withdraw from the matter.

(iii) Double Booking

[21] The next issue is the undisclosed double briefing. The Applicant submitted that the Respondent held a brief to appear in the George Regional Court in a second matter later on 5 February 2009 after conclusion of the Booysen matter. After the Booysen matter had been postponed, the Respondent requested the prosecutor to accompany him to the magistrate's office to arrange a time for the hearing of the second matter. He informed the magistrate that he would only be able to appear in the afternoon as he had urgent personal matters to attend to during the course of the morning. What the Respondent did not disclose to the magistrate or the prosecutor was that he was unable to proceed with the second matter in the George Regional Court that morning, not only by reason of his personal commitments, but also because he had a prior arrangement with the prosecutor in the Thembalethu Regional Court, to appear in that court at 11h00 that morning.

[22] The Respondent denied that he held briefs to appear in different courts on the same day. He did not deal with the allegation that he appeared in the Thembalethu Regional Court at 11h00 on 5 February 2009.

Issues to be decided

[23] With this factual background, the court was asked to decide whether:

(a) the Respondent acted in an unprofessional manner unbecoming of an advocate.

(b) he was fit and proper person to continue to practice as an advocate.

Alternatively

to suspend him from practice for a certain period to be determined by the Court.

Applicable Law

[24] Our courts recognise the divided referral legal profession as one of the mechanisms that serves better the public interest.

In Rösemann v General Council of the Bar of South Africa 2004 (1) SA 568 (SCA) at 583 B-H, the court held that:

> "Our law recognises a divided profession coupled with the referral system (see *Commissioner, Competition Commission v General Council of the Bar of South Africa and Others* 2002 (6) SA 606 (SCA) at 620C-D). In terms of the referral system an advocate may, save in certain exceptional circumstances, not presently relevant, accept instructions only from an attorney. In the *Commissioner, Competition Commission* case *loc cit* Hefer AP said in regard to a refusal by the Competition Commission to exempt the referral rule of the members of the General Council of the Bar of South Africa from the provisions of the Competition Act 89 of 1998: This is the law of the land and the Commission was not entitled to "bend" it.'
>
> [para 47].

In *De Freitas and Another v Society of Advocates of Natal and Another* 2001 (3) SA 750 (SCA) at 763 G Cameron JA said:

> '(I)t is in the public interest that there should be a vigorous and independent Bar serving the public, which, subject to judicial supervision, is self-regulated, whose members are in principle available to all, and who in general do not

perform administrative and preparatory work in litigation but concentrate their skills on the craft of forensic practice'.
[para 48].

[25] The Applicant brings these proceedings in terms of section 7(1) of the Act. It is authorised do so by virtue of section 7(2) of the Act which provides:

> "(2) Subject to the provisions of any other law, an application under paragraph (a), (b), (c) or (d) of subsection (1) for the suspension of any person from practice as an advocate or for the striking off of the name of any person from the roll of advocates may be made by the General Council of the Bar of South Africa or by the Bar Council or the Society of Advocates for the division which made the order for his or her admission to practice as an advocate or where such person usually practises as an advocate or is ordinarily resident, and, in the case of an application made to a division under paragraph (c) of subsection (1), also by the State Attorney referred to in the State Attorney Act, 1957 (Act 56 of 1957)."

In explaining the nature of the proceedings, **Kroon J** had this to say in **General Council of the Bar of South Africa v Matthys** 2002 (5) SA 1 (ECD) paras 4-6

> "[4] (1) The proceedings are not ordinary civil proceedings, but are *sui generis* in nature: they are proceedings, of a disciplinary nature, of the Court itself, not those of the parties; the Court exercises its inherent right to control and discipline the practitioners who practice within its jurisdiction; the applicant, in bringing the application, acts pursuant to its duty as *custos morum* of the profession; in the interests of the Court, the public at large and the profession, its role is to bring evidence of a practitioner's misconduct before the Court, for the latter to exercise its disciplinary powers; the proceedings are not subject to all the strict rules of the ordinary adversarial process. **Society of Advocates of South Africa (Witwatersrand Division) v Edeling** 1998 (2) SA 852 (W) at 8591 *et seq.*
> (2) Evidence which would have been inadmissible in 'civil proceedings' may be considered in disciplinary proceedings against a practitioner in the High Court. **Incorporated Law Society, Transvaal v Meyer and Another** 1981 (3) SA 962 (T) at 968F.

[5] The Court has first to decide whether the alleged offending conduct has been established on a preponderance of probability and, if so, whether the person is a fit and proper person to practise as an advocate. Although the last finding to some extent involves a value judgement, it is in essence one of making an objective finding of fact and discretion does not enter the picture. But, once there is a finding that he is not a fit and proper person to practise, he may in the Court's discretion either be suspended or struck off the roll. **Kekana v Society of Advocates of South Africa** 1998 (4) SA 649 (SCA) at 654C – E; **Jasat v Natal Law Society** 2000 (3) SA 44 (SCA) at 51.

[6] (1) ```The proceedings are instituted by the Law Society for the definite purpose of maintaining the integrity, dignity and respect the public must have for officers of this Court. The proceedings are of a purely disciplinary nature, they are not intended to act as punishment of the respondent. He has received his sentence for the offence he committed and it is no longer a matter that will influence us in dealing with this case. It is for the Courts in cases of this nature to be careful to distinguish between justice and mercy. An attorney fulfils a very important function in the work of the Court. The public are entitled to demand that a Court should see to it that officers of the Court do their work in a manner above suspicion. If we were to overlook misconduct on the part of officers of the Court, if we were to allow our desire to be merciful to overrule our sense of duty to the public and our sense of importance attaching to the integrity of the profession we should soon get into a position where the profession would be prejudiced and brought into discredit.''' **Law Society v Du Toit** 1938 OPD 103, approved in **Society of Advocates of South Africa (Witwatersrand Division) v Cigler** 1976 (4) SA 350 (T) at 357H – 358B.

(2) 'In dealing with cases of this kind the Court should be guided by what was said by **Williamson JP** in **Ex parte Knox** 1962 (1) SA 778 (N) at 784G:

> 'The Courts have repeatedly warned themselves against allowing sympathy for the applicant to weigh with them in deciding whether or not to allow an attorney or advocate again to enter the ranks of his profession. The Court's duty is first and foremost and at all times, to be satisfied in these matters that the applicant is a proper person to be allowed to practice and a person whose readmission to the ranks involves no danger to the public and no danger to the good name of the profession.''''

[26] When assessing the effect that the Respondent's conduct has on the question whether he is a fit and proper person to practice as an advocate the court will have regard to the explanation tendered by the Respondent for his conduct, either to the Applicant when it called for an explanation or in papers filed by the respondent in resisting the application **(General Council of the Bar of South Africa v Matthys,**

supra **para 24).** An advocate is expected to display personal integrity and scrupulous honesty. In the words of **James, JP** in **Ex Parte : Swain** 1973 (2) SA 472 (N) at 434H:

> "The same standard is required in relations between advocates and between advocates and attorneys. The proper administration of justice could not easily survive if the profession were not scrupulous of the truth in their dealings with each other and with the Court."

[27] The question whether an advocate is not a fit and proper person to continue to practice as an advocate is determined on the basis of the cumulative effect of the conduct of the advocate concerned. This point is well emphasised by **Van Blerk JA** in **Beyers v Pretoria Balieraad** 1966 (2) SA 593 (A) at 606B-C:

> "Al sou dit gesê kan word dat, as elkeen van die verskillende klagtes waaruit die gewraakte gedrag bestaan in isolasie geneem word, dit allenstaande nie 'n bevinding van onprofessionele gedrag regverdig nie, maar as die kumulatiewe effek van almal saam as 'n geheel geneem word, dan vind ek dit onmoontlik, inagnemende die aard van die saak en die wye diskressie wat die Hof *a quo* in hierdie geval het, om van die bevinding van daardie Hof in die uitoefening van sy diskresie te verskil."

(See also **Society of Advocates, Natal v Z** 1998 (3) SA 443 (N) at 496, **Algemene Balieraad van Suid-Afrika v Burger en 'n Ander** 1993 (4) SA 510 (T) at 519G and **Matthys** decision, *supra* at 24B).

[28] In proceedings of this nature where there is a dispute of fact on the papers, in Van Der Berg v General Council of the Bar of SA [2007] 2 ALL SA 499 (SCA) at 501 par 2, the court said that:

> "Proceedings to discipline a practitioner are generally commenced on notice of motion but the ordinary approach as outlined in Plascon-Evans is not appropriate to application of that kind. The applicant's role in bringing such proceedings is not that of an ordinary adversarial litigant but is rather to bring evidence of a practitioner's misconduct to the attention of the court, in the interests of the court, the profession and the public at large, to enable a court to exercise its disciplinary powers. It will not always be possible for a court to properly fulfil its disciplinary function if it confines its enquiry to admitted facts as it would ordinarily do in motion proceedings and it will often find it necessary to properly establish the facts. Bearing in mind that

> it is always undesirable to attempt to resolve factual disputes on the affidavits alone (unless the relevant assertions are so far-fetched or untenable as to be capable of being disposed of summarily) that might make it necessary for the court itself to call for oral evidence or for the cross-examination of deponents (including the practitioner) in appropriate cases."

Application of law to the facts / analysis of the evidence

[29] I now turn to consider whether misconduct on the part of the Respondent has been established on a preponderance of probability and, if so, whether the Respondent is a fit and proper person to practice as an advocate. The charge of unprofessional conduct on the part of the Respondent is based on three instances of misconduct, namely dishonesty towards Mrs Paradise, dishonesty in Booysen matter and dishonesty in non-disclosure of double briefing.

[30] Mr Carstens SC for the Applicant submitted that the Respondent's explanation in his answering affidavit that he did not undergo a period of pupillage as an advocate and that he was never admitted as an attorney is not convincing. In other words, he was unaware of the distinction between the role and functions of an advocate and those of an attorney. Mr Carstens further submitted that the Respondent was a State Prosecutor for 10 years before venturing into private practice, and could not claim that he was unaware of the distinction between the role and functions of an advocate and those of attorney.

[31] Mr Borgstrom on behalf of the Respondent submitted that the Respondent admitted that he contravened his ethical obligations in that he consulted with the client in the absence of an instructing attorney. He admitted taking a deposit directly from the client and placed same into his bank account. There was evidence that the Respondent practised as State Advocate for a number of years. Consequently I reject the view that he was unable to distinguish between the Attorney's and Advocate's functions. The Respondent is expected to know and to abide by the rules of his profession. It is no excuse that the Respondent had never been admitted as an attorney, nor is it a valid reason for the Respondent to raise that he did not undergo pupillage.

[32] I am of the view that though the Respondent in his answering affidavit did not tell the truth. In his submission in court he had changed his attitude, as he admitted this misconduct. There is no doubt that the Respondent acted in breach of his duty as an advocate when he consulted with Mrs Paradise on 15 January 2009 without an

intervention of an attorney, and accepted from her a payment of R10 000.00, and for amongst other things preparing a letter of demand.

[33] Mr Carstens submitted that the Respondent acted dishonestly in that he appeared on four occasions on behalf of Booysen matter without have been briefed by an attorney.

[34] Mr Borgstrom submitted that the Respondent admitted that he contravened his ethical obligations in that he appeared in both the district and regional courts held in George unaccompanied by an instructing attorney. He submitted further that the Respondent failed to communicate with his instructing attorney between formal appearances in anticipation of the hearing date.

[35] He submitted further that the Respondent conceded that his actions in both Paradise and Booysen complaints fell short of the standard of conduct expected from a fit and proper advocate and that such conduct deserved sanction.

[36] In the Booysen case the Respondent had denied any wrong doing in his answering affidavit instead justified his conduct. In court, the Respondent had changed his attitude by admitting his wrongdoing. The court accepted his submission.

[37] Mr Carstens submitted that with regards to the undisclosed double briefing, the Respondent's actions could only have been intentional and therefore constituted a dishonest conduct.

[38] Mr Borgstrom submitted that the Respondent conceded that he should have informed the presiding Magistrate that in addition to the urgent personal matter which he had to attend during the course of the morning, that he intended to make a formal appearance as arranged with the prosecutor in the Thembalethu Regional Court.

[39] Initially the Respondent's attitude in his answering affidavit was that of denial. He denied that he had improperly appeared in matters set down on the same day in both Regional Courts in George and Thembalethu. In court again his attitude had changed as he admitted that his conduct was improper.

Findings

[40] In court the Respondent's attitude had changed and he did not waste the court's time as he admitted his wrong doing. The court accepted

his admission of his wrong doing conduct, regarding Paradise Complaint, the Booysen Complaint and the undisclosed double briefing complaint.

[41] In my view, it is common cause that the Respondent is guilty of all three complaints against him. He is undoubtedly guilty of misconduct in all three complaints.

[42] Mr Carstens submitted the following:

(a) that the Respondent had shown on a balance of probabilities not to be a fit and proper person to practice as an advocate;

(b) with regards to an appropriate sanction, mendacity on the part of the Respondent in a matter of this nature is an aggravating factor. In case, the Respondent not only (in the Booysen and undisclosed double briefing matters) misled the George regional court magistrate but, more importantly, had on all the transgressions levied against him been untruthful to this court. At no stage did he sought to rectify the lies he presented to the Applicant when given an opportunity to answer the allegations against him. He preferred instead to persist in it in his answering affidavit;

(c) the Respondent through his actions has shown that he did not view his transgressions in a serious light, as is borne out by his offer to settle this application on the basis of a six weeks self-imposed suspension;

(d) in the circumstances a severe censure is called for, namely that the Respondent should be suspended from practice for a period of five years.

[43] Mr Borgstrom made the following submissions:

(i) when the facts in this case are measured against those in the several past cases, a suspension is an appropriate sanction in the circumstances;

(ii) in Paradise complaint, the Respondent accepted payment with the intention of performing professional services and accepted that he would only be able to retain funds as reasonable compensation for services rendered. The amount in this case was not exorbitant and the money was returned to Mrs Paradise immediately upon request;

(iii) the Respondent had never held himself out to be an attorney. He had also freely tendered that he should be subjected to a harsher punishment if he is ever found guilty of blurring the boundaries between his work as an advocate and that of an attorney;

(iv) the Respondent had never enjoyed the benefits of a period of pupillage or articles and is thus self-taught as a practitioner;

(v) the Respondent had openly accepted his short comings and displayed contrition for his actions; and

(vi) in all the circumstances, the court should impose a suspension from practice on the Respondent for a period of six months.

Order

[44] In my view an order suspending the Respondent from practice conditionally will be appropriate in the circumstances, for the following reasons that:

(i) he was a first offender;

(ii) with the exception of Paradise complaint, the other two complaints (namely Booysen and undisclosed double briefing) were not that serious;

(iii) the Respondent's attitude in his answering affidavit was arrogant and also economic with the truth. His attitude in court was remorseful;

(iv) submissions by the Applicant and Respondent counsel for the suspension of the Respondent from practice for a certain period of time are persuasive.

[45] In the result, I would make the following order:

1. The Respondent is hereby suspended from practice for a period of three (3) years from the date of this order;
2. The Respondent is ordered to pay the wasted costs of the postponements; and
3. The Respondent is ordered to pay an additional amount of R4 000.00 towards the remainder of the Applicant's costs in this matter.

SAMELA, J

I agree and it is so ordered

TRAVERSO, DJP