IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 15271/2015

DATE: 8 OCTOBER 2015

In the matter between:

CAPE LAW SOCIETY Applicant

And

MATTHEWS QALISILE DAYIMANI Respondent

J U D G M E N T

BINNS-WARD, J:

In this matter the Cape Law Society has applied for an order interdicting the respondent attorney from practicing as such pending the decision of the Court in an application which it indicates it will institute for the removal of the respondent's name from the roll of attorneys. The application for interim interdictory relief was brought in terms of Rule 6(12) on two weeks' notice to the respondent, and set down for hearing in the Third Division on Thursday, 3 September 2015.

On that date the respondent was represented by counsel and applied for an adjournment of the proceedings in order to file

further papers in response to what was contended to be new matter in the applicant's replying papers. Notwithstanding the applicant's opposition to the application for postponement, an order was made by Weinkove, AJ, on 3 September 2015, affording the respondent until 10 September to deliver his further affidavits and directing that arrangements thereafter be made through the office of the Judge President for the set down of the matter for hearing on a preferential basis.

The respondent did not comply with the time provisions laid down in the order made by Weinkove, AJ and delivered his further affidavit only on 16 September 2015. There has been no application for the condonation of the non-compliance with the terms of the order made by Weinkove, AJ. In addition, the respondent applied on 16 September 2015 to take the order made by Mr Acting Justice Weinkove under judicial review. An application for leave to appeal against Weinkove, AJ's judgment was also delivered.

Obviously, the application to review the proceedings before Mr Acting Justice Weinkove was misdirected and entirely incompetent; and, unsurprisingly, a notice of withdrawal of those proceedings with a tender to pay the wasted costs has since been forthcoming. The fate of the application for leave to appeal against the judgment is unknown, but it is clear that

the matter is in any event not appealable. It is curious indeed that either of the aforementioned applications was brought in view of the fact that Weinkove, AJ, in essence, granted the respondent what he sought on 3 September 2015.

Proceedings were set down for hearing in the Fourth Division on the direction of the Judge President, given on 17 September 2015. Notice of set down was served on the respondent by email on 18 September 2015. There was no communication between the respondent and the applicant, I am advised, between 17 September and today's date, 8 October 2015, when, immediately prior to the commencement of the hearing, so I am informed, the respondent, who appeared in person today, advised the applicant's attorney of his intention to apply for a postponement.

The application for postponement was moved orally by the respondent without papers. The reason offered in support of the application for postponement was the respondent's wish to continue to be represented by Mr Hinana, an advocate from Mmtata, who had, as mentioned, appeared for him previously. It would appear from what the respondent said in support of his application for postponement this morning that certain financial difficulties had prevented him from being able to secure the services of Mr Hinana to appear today.

The application for postponement was opposed by the Law Society and, in his address in support of the applicant's opposition to a further postponement of the matter, Mr Bean referred not only to the history of the matter since the institution of the current proceedings for interim relief, but also to the history of the respondent's interactions with the Law Society in the forerunning to the institution of the proceedings. He illustrated examples of the respondent's failure on repeated occasions to respond timeously, or at all, to correspondence directed to him by the Law Society in connection with the matters which form the basis of the complaint on which the Law Society primarily relies in the current proceedings.

To seek a postponement of proceedings is to seek an indulgence. It is not necessary to rehearse the principles authoritatively set out in judgments like Myburgh Transport v Botha t/a SA Truck Bodies 1991 (3) SA 310 (NmS), but it is well established that a balancing of interests is involved in the determination of the question. Certainly, the history of the current matter, as I have outlined it, is a matter which weighed against the grant of a postponement.

I had, nevertheless, also to consider the potential prejudice to the respondent in not being legally represented. In that regard I considered that any such prejudice was materially mitigated

by the fact that Mr Hinana had prepared heads of argument dealing with the merits in the matter prior to the hearing on 3 September 2015 and the respondent was able to hand those in. I would imagine that the submissions contained therein would be persisted in by Mr Hinana were a postponement to be granted to enable him to appear. It did not seem to me that the issues canvassed in the additional sets of affidavits exchanged after 3 September were of a nature that would bear on the result of this application and accordingly I did not consider the prejudice in Mr Hinana not being able to address those matters to be material.

In weighing whether a postponement should be granted or not, I also gave some consideration to the apparent merits of the matter with a view to considering whether there were issues that were sufficiently arguable to merit a further delay to enable the respondent to obtain legal representation. In that regard it was striking that the answering papers and the preceding correspondence concerning the matter from the respondent gave no answer to the principal complaint brought against him, which, as currently advised, will be the bedrock of the contemplated proceedings for his removal from the roll of attorneys: That is the apparent use by him of funds, amounting to nearly R270 000.00, paid to him by the Road Accident Fund in settlement of a claim by one of his clients,

Ms Memani, in May 2009. In the absence of any cogent explanation for that amount not having been retained in his trust account between 28 May 2009 and September or October 2013, when an amount of R200 000.00 was paid to Ms Memani - the balance allegedly having been retained on account of fees - led me to conclude that there was really nothing effective that could be said on the respondent's behalf on the papers by a legal representative, were one to be appointed.

A further factor, of course, was that Mr Dayimani, the respondent, is himself legally qualified and able, better than the average lay person, to represent himself. For those reasons, the application for a postponement was refused.

Proceedings of this nature, being an element of disciplinary proceedings against the respondent, are *sui generis,* and not like ordinary civil litigation. For that reason, none of the points taken by the respondent in opposing the application bore with particular relevance on the matter in hand.

In his answering papers he sought the striking of the matter from the roll on the basis of a lack of urgency. There is no doubt that the current proceedings could, and should, have been instituted with far greater expedition by the Law Society, but apparent misconduct of the nature involved in this case

and which, as I have said, has not been answered by the respondent at this stage, poses an on-going danger to the integrity of the profession and gives undue exposure to harm to members of the public liable to deal with the respondent.

The concern in that regard is exacerbated by the information apparent from the auditors' statement attached to the respondent's own second answering affidavit, which shows that in respect of the latest financial year substantial shortfalls have been reflected in the respondent attorney's trust account. These considerations, in themselves, make the matter urgent, notwithstanding the criticism that can be levied at the Law Society in taking so long to bring the proceedings.

The respondent also took the point that there had been a failure to exhaust internal remedies. Now, that is the sort of defence that is ordinarily raised in a judicial review context. It has no role in proceedings of this nature. There is no obligation on the Law Society or a similar professional body to go through an internal disciplinary process before instituting proceedings for relief of the nature sought in the current matter.

The appropriateness of proceeding in the manner that the Law Society did in the current case depends on the facts of the

case. And, in a matter in which is apparent that a substantial sum of money has been misappropriated from a trust account and no cogent answer or explanation for the situation has been offered, the Law Society cannot be criticised for proceeding as it has done.

In my view, the general principles applicable to interim interdicts are not entirely transposable to proceedings of this nature because of their *sui generis* character. In bringing proceedings of this nature the Law Society is not exercising or protecting a right; and it has no apprehension of harm for itself. It is, as the cases, to which it is not necessary to refer individually, have repeatedly confirmed, acting virtually in a *pro bono* capacity for the benefit of society at large and to uphold the integrity of the particular branch of the legal profession and the administration of justice as a whole.

The pertinent criterion in determining a case of this nature, in my view, is the apparent prospects of success in the principal case. If it appears *prima facie* that an attorney has made himself guilty of misconduct which would lead to his removal from the roll and is practicing in circumstances where the public at large is at risk of becoming the victim of similar misconduct, interim relief of this nature is indicated. The findings of the court in granting it are, of course, entirely

provisional and do not pre-empt the result of the principal proceedings. But, on the facts adduced on the papers before the court at this stage, there is, as I have said, an un-rebutted indication of the misappropriation of funds from the respondent's trust account in a significant amount and an indication in the subsequent auditor's reports that I have referred to that the problem is not confined to the particular matter which gave rise to the Law Society's investigation. It is not desirable in interim proceedings for me to express myself in any greater detail or any more definitively in respect of the issues involved, lest that be prejudicial to the respondent in the principal proceedings.

The notice of motion sought interim relief pending the institution of proceedings at a later stage; that later stage not being in any way defined. In my view that is unreasonable and unacceptable. It is desirable in matters like this, where an interim order will have a materially intrusive effect on the respondent's ability to earn a living in the profession to which he has been admitted, and remains admitted, for the suspension of his activities not to be unduly prolonged. I have referred earlier to my concerns about the delays that have characterised this matter on the part of the Law Society, and it is important that they not be permitted to be perpetuated. The order that will be made will therefore provide that the principal

proceedings must be instituted before 30 January 2016. I would have thought that quite a prolonged period, but Mr Bean explained to me that in the nature of these matters, the founding papers in the principal proceedings are, as a matter of course, prepared by the Law Society with regard to the findings of the curator put in charge of the respondent's practice during the period of the operation of the interim order.

IN THE CIRCUMSTANCES AN ORDER WILL ISSUE IN TERMS OF PARAGRAPH 2 OF THE NOTICE OF MOTION INCORPORATING SUBPARAGRAPHS 2(1) TO 2(10) PROVIDED THAT THE INTRODUCTION TO PARAGRAPH 2 SHALL BE READ AS IF PROVIDING AS FOLLOWS:

> **"THAT PENDING THE DECISION OF THIS HONOURABLE COURT IN AN APPLICATION TO BE INSTITUTED AGAINST THE RESPONDENT BY THE APPLICANT BEFORE 31 JANUARY 2016 FOR THE STRIKING OFF OF THE RESPONDENT'S NAME FROM THE ROLL OF ATTORNEYS' OF THIS HONOURABLE COURT:"**

THE RELIEF SOUGHT IN TERMS OF PARAGRAPHS 2.11.1, 2.11.2 AND 2.11.3 OF THE NOTICE OF MOTION SHALL STAND OVER FOR DETERMINATION IN THE PROCEEDINGS

TO BE INSTITUTED FOR THE STRIKING OFF OF THE RESPONDENT.

AN ORDER IS MADE IN TERMS OF PARAGRAPH 2.11.4 OF THE NOTICE OF MOTION AND IN TERMS OF PARAGRAPHS 3 AND 4 THEREOF.

_____

BINNS-WARD, J