REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

CASE NO: 8675/2009

29/3/2011

(1) REPORTABLE: ~~YES~~ / (NO)

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / (NO)

(3) REVISED.

2011.03.29
DATE

SIGNATURE

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES Applicant

and

DEVANATHAN COLIN PATHER Respondent

J U D G M E N T

MAKGOKA, J:

Introduction

[1] This is an application by the Law Society of the Northern Province (the Law Society) to strike the name of the respondent from the roll of attorneys of this court, and related ancillary relief. The respondent opposes the application and has filed an answering affidavit.

Background

[2] The respondent was admitted as an attorney of the then Natal Provincial Division on 16 August 1999 and his name still appears on the roll of that court. On 21 September 2004 the respondent enrolled as an attorney of this court and he is still so enrolled. He practiced as a sole practitioner in Boksburg until he closed his practice on 31 August 2008.

[3] The Law Society initiated this application in February 2009 after receiving some complaints, which I would deal with later. On 4 June 2010 the matter came before us. The respondent had not filed any heads of argument at that stage. His attorney requested a postponement, which was opposed by the Law Society. Ultimately the postponement was granted, and the matter was remanded to 28 July 2010. The respondent was ordered to pay the costs occasioned by the postponement on an attorney and client scale.

[4] The respondent filed his heads of argument on 27 July 2010. On 28 July 2010 the matter could not proceed as I had been assigned to do circuit court duty during that period. The matter was then removed from the roll and eventually enrolled for 18 October 2010, on which occasion the matter was fully argued and judgment was reserved.

The general principles

[5] The applications such as the present are *sui generis* and of a disciplinary nature. There is no *lis* between the Law Society and the respondent. The Law Society, as a *custos morum* of the attorneys' profession, places before court facts for consideration and an exercise of a discretion. See generally: *Hassim v Incorporated Law Society of Natal* 1977 (2) SA 757 (A) at 767 C-G; *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T) at 393E; *Cirota & Another v Law Society, Transvaal* 1979 (1) SA 172 (A) at 187 H and *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 851E-F.

[6] The question whether an attorney is no longer a fit and proper person to practice as such lies, in terms of section 22 (1) (d) of the Act, in the discretion of the court. See *Law Society of the Good Hope v Budricks* 2003 (2) SA 11 (SCA). Once a court has determined that an attorney is not longer fit to remain on the roll of attorneys, the court must determine an appropriate sanction, namely a suspension from practice or striking from the roll. This determination also lies within the discretion of the court. The opinion or conclusion of the Law Society that a practitioner is no longer a fit and proper person to practise as an attorney carries great weight with the court, although the court is not bound by it: *Kaplan v Incorporated Law Society, Transvaal* 1981 (1) SA 762 (T) at 781H.

The complaints against the respondent

[7] The Law Society alleges that the respondent had made himself guilty of the following transgressions of its rules: (a) misappropriation of trust funds, (b) failure to appear before disciplinary committees of its council; (c) failure to co-operate with the Law Society fully and unconditionally and (d) failure to give proper attention to the affairs of one of his clients. The complaints are by an advocate and former clients of the respondent.

Advocate Halgryn

[8] The complaint by Advocate Leon Halgryn is in essence that the respondent failed to pay over his fees in the amount of R50 331.11, despite that the client had provided the respondent with funds for that purpose. It is common cause that the respondent has conveyed to Halgryn that he indeed received the funds from his client but had utilized such funds for other purposes. It is further common cause that the respondent sought extension from Halgryn to pay the funds over to Halgryn, and that the respondent failed to honour his commitment in this regard.

[9] In its supplementary founding affidavit, the Law Society added three more complaints received by it against the respondent. The complaints are by Mr. Motswi, Mrs. Naidu and Mr. Manda.

Mr. Motswi

[10] Mr. Motswi complained that he instructed the respondent to act on his behalf in a labour matter and paid the respondent an amount of R1900 as a deposit towards his fees. According to Motswi the respondent failed to carry out his instructions.

Mrs Naidu

[11] Mrs Naidu also instructed the respondent to act on her behalf in a labour dispute. During January 2009 the respondent requested her to grant her a loan of R20 000, which she did. The respondent undertook to repay the money within one week. In return the respondent undertook not to charge Mrs Naidu any legal fees for her labour matter. During January 2009 the respondent requested Naidu a further loan in the amount of R18 000. The respondent has failed to repay Naidu's monies. The respondent also failed to attend to the labour matter of Naidu, with the result that the matter became prescribed. The respondent has also failed to honour his undertaking to furnish Naidu's new attorneys with a statement of account in respect of his fees and disbursements allegedly owed to him.

Mr. JP Manda

[12] Mr. Manda is a director of Dedicated Wheels (Pty) Ltd. During June 2007 the company instructed the respondent to act on its behalf against another entity for breach of contract, and ancillary matters against Standard Bank and Wesbank. The respondent agreed with the company to lease to him the company trucks in order to enable him to utilize the trucks to generate revenue and, by doing so, to pay monies

due to the company's financiers, Standard Bank and Wesbank. In terms of the agreement, the respondent undertook to pay an amount of R150 000 to Mr. Manda and his co-director. The respondent failed to honour the agreement, and further failed to keep Mr. Manda and his co-director abreast on the revenue generated in the process, which revenue should have been in his trust account. When Mr Manda enquired with the respondent as to the progress in the matter entrusted to him, the respondent had left his practice and moved to Durban.

Disciplinary proceedings

[13] The respondent was initially requested to appear before a disciplinary committee of the council on 17 May 2007 to answer to the charges relating to the complaint by Halgryn. The Law Society's notice could not be delivered to the respondent due to the fact that the respondent left his address reflected in the Law Society's records. The Law Society alleges that the respondent failed to notify it of his change of address, in contravention of rule 3, read with rule 89.11 of the rules.

The respondent's response

[14] The thrust of the respondent's response to the Law Society's allegations seems to be the following: because the respondent has not appeared before any disciplinary committee where evidence was led and a finding of guilty was returned against him, this court is not competent to consider this application. Put differently, this application is premature.

[15] With regard to individual complaints, the respondent deals with them as follows:

Halgryn

[15.1] He had reached agreement with Halgryn in terms of which he could utilize the fees and pay the fees later.

Motswi

[15.2] This complainant is dealt with in a single paragraph by the respondent. To avoid an injustice to the respondent through paraphrasing, I quote in full the respondent's response:

> "The complaint from Motswi was properly and extensively dealt with by the respondent. The respondent submitted several letters in this matter, setting out the facts and what had transpired. These letters, the applicant has in its possession. The respondent was not advised of any outcome of the correspondences or summoned to appear before any disciplinary enquiry and only became aware that this matter was part of the application on receipt of the application."

Naidu

[15.3] The respondent states that the loans given to him by Naidu were in his personal capacity and not as an attorney. He further states that the Law Society did not deal with the matter in a disciplinary committee, but brought it straight before court.

Manda

[15.4] The respondent makes a general denial of the allegations made in this regard, and simply denies the existence of the agreement alluded to in terms of which he was to pay an amount of R150 000 monthly to Manda and/or his co-director.

Analysis

[16] The allegations against the respondent are quite serious. Therefore one would have expected the respondent to deal with them fully and as comprehensively as possible. Unfortunately, the respondent's attitude as outlined above, manifests a regrettable lack of insight into the nature and scope of his obligation in this regard. These proceedings are disciplinary in nature. It follows that a respondent is expected to co-operate and provide, where necessary, information, to place the full facts before the Court to enable it to make a correct decision. Broad denials and obstructionism have no place in such proceedings: *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 851E-F. In the present case, the respondent has adopted a combative and belligerent attitude towards the Law Society.

[17] The respondent's contention that because he has not appeared before a disciplinary committee of the council of the Law Society where a guilty verdict was returned, and that this court can therefore not entertain the matter, is both untenable and disingenuous. As demonstrated in paragraph 22 of this judgment, the respondent used all the delaying tactics in the book to frustrate the Law Society's efforts to bring him before a disciplinary committee. It therefore does not lie in the

mouth of the respondent to make this contention. In any event, it is not a prerequisite for the court to hear the application that there had been a guilty verdict in a disciplinary hearing.

[18] The respondent's contention that he used Halgryn's fees with the latter's agreement, is instructive of the respondent's misconstruction of an attorney's trust account and how it should be conducted. Once monies are entrusted to the attorney, such monies are "owned" by the Trust creditor, i.e the client of the attorney. Those monies can only be dealt with in accordance with the mandate of the client. It does not assist the respondent that he could have possibly agreed with Halgryn to use the monies for other purposes.

[19] Even if it was permissible for the respondent to use the monies for other purposes with the agreement of Halgryn, it is improbable, on the undisputed facts, that Halgryn had agreed to such an arrangement. In this regard, the undisputed cellphone text messages exchanged between the respondent and Halgryn, are important. I quote three of such messages:

> "Dear Leon, I used fees that I collected for the satawu matter during the period I was fighting cons..... pls try not to be angry. Colin
>
> I used the fees when I was desperate with no income at the time.
>
> Leon I will pay yr money ..... I used the fees to live on and keep my family going."
>
> (My emphasis)

[20] Two things militate against the respondent's assertion that he used the monies with Halgryn's agreement. First, had that been the case, (which would have taken place prior to his usage of the monies) the tone of the messages would be different. The constant reference to "I used the fees" in his messages, suggests strongly that no prior agreement had been reached with Halgryn, otherwise the respondent could have simply reminded Halgryn of their agreement. Second, Halgryn would probably not have issued summons against the respondent had there been an agreement, nor complain to both the Bar Council and the Law Society. Even if there was agreement between the respondent and Halgryn, the respondent, on his own version, has failed to repay the monies to Halgryn. I am therefore of the view that, on the probabilities, the respondent used the fees meant for Halgryn for other purposes, without Halgryn's agreement.

[21] I am therefore satisfied that the respondent has misappropriated trust funds. On this basis alone, the respondent has rendered himself unworthy to remain on the roll of attorneys and stands to b e struck off the roll.

[22] As it is clear from the respondent's reply, the respondent has made no serious attempt to deal comprehensively with the complaints of Motswi, Naidu and Manda. The respondent has displayed an obstructionist and belligerent attitude towards the Law Society in its endeavours to bring him before a disciplinary committee of its council. The disciplinary hearings were first scheduled for 17 May 2007. Since then, the respondent has adopted delaying tactics, to frustrate the Law Society's

efforts to bring him before a disciplinary committee of its Council. Four postponements, all at the instance of the respondent, usually requested either on the eve or morning of the hearing, were granted. The Law Society ultimately refused to accede to a further postponement and ultimately held a disciplinary hearing in his absence on 18 June 2009.

Conclusion

[23] The respondent's conduct outlined in the application, whether taken as individual complaints or cumulatively, in my view, reveals conduct on the part of the respondent inconsistent with membership of the attorneys' profession. The respondent has thus rendered himself unworthy to remain on the roll of attorneys.

[24] In my view, the complaints against the respondent are so serious that the only sanction I deem suitable under the circumstances, is the striking of his name from the roll of attorneys.

Costs

[25] In matters such as these, policy considerations are that the Law Society, as the *custos morum* of the attorneys' profession, should not be burdened with legal costs when launching applications against attorneys who have made themselves guilty of dishonourable, unworthy or professional conduct. A practice has therefore developed on that basis that costs are granted on an attorney and client scale. The Law Society has requested such a cost order. I see no reason why it should not be granted.

[26] In the result I make the following order:

1. The name of Devanathan Colin Pather (the respondent) is struck from the roll of attorneys of this court.

2. Paragraphs 2 – 12, all inclusive, of the draft order attached hereto and marked "A" are made part of the order of this court.

TM MAKGOKA
JUDGE OF THE HIGH COURT

I agree

CP RABIE
JUDGE OF THE HIGH COURT

DATE HEARD	:	**18 OCTOBER 2010**
JUDGMENT DELIVERED	:	29 ~~18~~ MARCH 2011
FOR THE APPELLANT	:	**MS F ASMAL**
INSTRUCTED BY	:	**ROOTH & WESSELS, PRETORIA**
FOR THE RESPONDENT	:	**MR KIRPAL**
INSTRUCTED BY	:	**KIRPAL ATTORNEYS, PRETORIA**

"A"

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Case number: 8675/2009

PRETORIA this

BEFORE THE HONOURABLE MR JUSTICE RABIE
BEFORE THE HONOURABLE MR JUSTICE MAKGOKA

In the application of:

THE LAW SOCIETY OF THE NORTHERN PROVINCES
(Incorporated as the Law Society of the Transvaal) Applicant

and

DEVANATHAN COLIN PATHER Respondent

ORDER

Having heard counsel for the applicant and the respondent and having read the documents filed of record

IT IS ORDERED

1. That the name of Devanathan Colin Pather (respondent) be struck from the roll of attorneys of this Honourable Court.

2. That respondent hands and delivers his/her certificate of enrolment as an attorney to the Registrar of this Honourable Court.

3. That in the event of the respondent failing to comply with the terms of this order detailed in the previous paragraph within two (2) weeks from the date of this order, the sheriff of the district in which the certificate is, be authorised and directed to take possession of the certificate and to hand it to the Registrar of this Honourable Court.

4. That respondent be prohibited from handling or operating on his trust accounts as detailed in paragraph 5 hereof.

5. That Johan van Staden, the head : members affairs of applicant or any person nominated by him, be appointed as *curator bonis* (curator) to administer and control the trust accounts of respondent, including accounts relating to insolvent and deceased estates and any deceased estate and any estate under curatorship connected with respondent's practice as an attorney and including, also, the separate banking accounts opened and kept by respondent at a bank in the Republic of South Africa in terms of section 78(1) of Act No 53 of 1979 and/or any separate savings or interest-bearing accounts as contemplated by section 78(2) and/or section 78 (2A) of Act No. 53 of 1979, in which monies from such trust banking accounts have been invested by virtue of the provisions of the said sub-sections or in which monies in any manner have been deposited or credited (the said accounts being hereafter referred to as the trust accounts), with the following powers and duties:

5.1 immediately to take possession of respondent's accounting records, records, files and documents as referred to in paragraph 6 and subject to the approval of the board of control of the attorneys fidelity fund (hereinafter referred to as the fund) to sign all forms and generally to operate upon the trust account(s), but only to such extent and for such purpose as may be necessary to bring to completion current transactions in which respondent was acting at the date of this order;

5.2 subject to the approval and control of the board of control of the fund and where monies had been paid incorrectly and unlawfully from the undermentioned trust accounts, to recover and receive and, if necessary in the interests of persons having lawful claims upon the trust account(s) and/or against respondent in respect of monies held, received and/or invested by respondent in terms of section 78(1) and/or section 78(2) and/or section 78 (2A) of Act No 53 of 1979 (hereinafter referred to as trust monies), to take any legal proceedings which may be necessary for the recovery of money which may be due to such persons in respect of incomplete transactions, if any, in which respondent was and may still have been concerned and to receive such monies and to pay the same to the credit of the trust account(s);

5.3 to ascertain from respondent's accounting records the names of all persons on whose account respondent appears to hold or to have received trust

monies (hereinafter referred to as trust creditors) and to call upon respondent to furnish him, within 30 (thirty) days of the date of service of this order or such further period as he may agree to in writing, with the names, addresses and amounts due to all trust creditors;

5.4 to call upon such trust creditors to furnish such proof, information and/or affidavits as he may require to enable him, acting in consultation with, and subject to the requirements of, the board of control of the fund, to determine whether any such trust creditor has a claim in respect of monies in the trust account(s) of respondent and, if so, the amount of such claim;

5.5 to admit or reject, in whole or in part, subject to the approval of the board of control of the fund, the claims of any such trust creditor or creditors, without prejudice to such trust creditor's or creditors' right of access to the civil courts;

5.6 having determined the amounts which he considers are lawfully due to trust creditors, to pay such claims in full but subject always to the approval of the board of control of the fund;

5.7 in the event of there being any surplus in the trust account(s) of respondent after payment of the admitted claims of all trust creditors in full, to utilise such surplus to settle or reduce (as the case may be), firstly, any claim of the

fund in terms of section 78(3) of Act No 53 of 1979 in respect of any interest therein referred to and, secondly, without prejudice to the rights of the creditors of respondent, the costs, fees and expenses referred to in paragraph 10 of this order, or such portion thereof as has not already been separately paid by respondent to applicant, and, if there is any balance left after payment in full of all such claims, costs, fees and expenses, to pay such balance, subject to the approval of the board of control of the fund, to respondent, if he/she is solvent, or, if respondent is insolvent, to the trustee(s) of respondent's insolvent estate;

5.8 in the event of there being insufficient trust monies in the trust banking account(s) of respondent, in accordance with the available documentation and information, to pay in full the claims of trust creditors who have lodged claims for repayment and whose claims have been approved, to distribute the credit balance(s) which may be available in the trust banking account(s) amongst the trust creditors alternatively to pay the balance to the Attorneys Fidelity Fund;

5.9 subject to the approval of the chairman of the board of control of the fund, to appoint nominees or representatives and/or consult with and/or engage the services of attorneys, counsel, accountants and/or any other persons, where considered necessary, to assist him in carrying out his duties as curator; and

5.10 to render from time to time, as curator, returns to the board of control of the fund showing how the trust account(s) of respondent has/have been dealt with, until such time as the board notifies him that he may regard his duties as curator as terminated.

6. That respondent immediately deliver his/her accounting records, records, files and documents containing particulars and information relating to:

6.1 any monies received, held or paid by respondent for or on account of any person while practising as an attorney;

6.2 any monies invested by respondent in terms of section 78(2) and/or section 78 (2A) of Act No 53 of 1979;

6.3 any interest on monies so invested which was paid over or credited to respondent;

6.4 any estate of a deceased person or an insolvent estate or an estate under curatorship administered by respondent, whether as executor or trustee or curator or on behalf of the executor, trustee or curator;

6.5 any insolvent estate administered by respondent as trustee or on behalf of the trustee in terms of the Insolvency Act, No 24 of 1936;

6.6 any trust administered by respondent as trustee or on behalf of the trustee in terms of the Trust Properties Control Act, No 57 of 1988;

6.7 any company liquidated in terms of the Companies Act, No 61 of 1973, administered by respondent as or on behalf of the liquidator;

6.8 any close corporation liquidated in terms of the Close Corporations Act, 69 of 1984, administered by respondent as or on behalf of the liquidator;

6.9 respondent's practice as an attorney of this Honourable Court,

to the curator appointed in terms of paragraph 5 hereof, provided that, as far as such accounting records, records, files and documents are concerned, respondent shall be entitled to have reasonable access to them but always subject to the supervision of such curator or his nominee.

7. That should respondent fail to comply with the provisions of the preceding paragraph of this order on service thereof upon him/her or after a return by the person entrusted with the service thereof that he has been unable to effect service thereof on respondent (as the case may be), the sheriff for the district in which such accounting records, records, files and documents are, be

empowered and directed to search for and to take possession thereof wherever they may be and to deliver them to such curator.

8. That the curator shall be entitled to:

8.1 hand over to the persons entitled thereto all such records, files and documents provided that a satisfactory written undertaking has been received from such persons to pay any amount, either determined on taxation or by agreement, in respect of fees and disbursements due to the firm;

8.2 require from the persons referred to in paragraph 8.1 to provide any such documentation or information which he may consider relevant in respect of a claim or possible or anticipated claim, against him and/or respondent and/or respondent's clients and/or fund in respect of money and/or other property entrusted to respondent provided that any person entitled thereto shall be granted reasonable access thereto and shall be permitted to make copies thereof.

9. That respondent be and is hereby removed from office as -

9.1 executor of any estate of which respondent has been appointed in terms of section 54(1)(a)(v) of the Administration of Estates Act, No 66 of 1965 or the estate of any other person referred to in section 72(1);

9.2 curator or guardian of any minor or other person's property in terms of section 72(1) read with section 54(1)(a)(v) and section 85 of the Administration of Estates Act, No 66 of 1965;

9.3 trustee of any insolvent estate in terms of section 59 of the Insolvency Act, No 24 of 1936;

9.4 liquidator of any company in terms of section 379(2) read with 379(e) of the Companies Act, No 61 of 1973;

9.5 trustee of any trust in terms of section 20(1) of the Trust Property Control Act, No 57 of 1988;

9.6 liquidator of any close corporation appointed in terms of section 74 of the Close Corporation Act, No 69 of 1984.

10. That respondent be and is hereby directed:

10.1 to pay, in terms of section 78(5) of Act No. 53 of 1979, the reasonable costs of the inspection of the accounting records of respondent;

10.2 to pay the reasonable fees of the auditor engaged by applicant;

10.3 to pay the reasonable fees and expenses of the curator, including travelling time;

10.4 to pay the reasonable fees and expenses of any person(s) consulted and/or engaged by the curator as aforesaid; and

10.5 to pay the costs of this application on an attorney-and-client scale.

11. That if there are any trust funds available the respondent shall within 6 (six) months after having been requested to do so by the curator, or within such longer period as the curator may agree to in writing, shall satisfy the curator, by means of the submission of taxed bills of costs or otherwise, of the amount of the fees and disbursements due to him/her (respondent) in respect of his/her former practice, and should he/she fail to do so, he/she shall not be entitled to recover such fees and disbursements from the curator without prejudice, however, to such rights (if any) as he/she may have against the trust creditor(s) concerned for payment or recovery thereof;

12. That a certificate issued by a director of the Attorneys Fidelity Fund shall constitute *prima facie* proof of the curator's costs and that the Registrar be authorised to issue a writ of execution on the strength of such certificate in order to collect the curator's costs.

BY ORDER OF THE COURT

REGISTRAR

64. ROOTH & WESSELS

(A BLOEM B26237)