IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

17/9/12

CASE NO: 20408/08

In the matter between:

LAW SOCIETY OF THE NORTHERN PROVINCES Applicant

and

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

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

13/09/12
DATE

SIGNATURE

VERNON GUYS SIDWELL Respondent

JUDGMENT

Tuchten J:

1 The applicant Law Society applies for the name of the respondent to be struck off the roll of attorneys and for the usual relief associated with such an application.

2 The Law Society raises a number of grounds of alleged misconduct against the respondent but during argument the representative of the Law Society confined its case to only two of these. On the view I take of the matter, it is necessary to refer to only one, the first charge

advanced in the founding affidavit. The charge relates to a third party claim the respondent handled for Mrs TS Mathibe.[1]

3 It is common cause on the papers that Mrs Mathibe was successful in her claim against the Road Accident Fund and that the RAF paid a total of R513 617,71 in instalments during the period September 2005 to January 2006 to the respondent as her attorney in settlement of Mrs Mathibe's claim. The order in terms of which the RAF was ordered to pay this amount also directed the RAF to pay Mrs Mathibe's party and party costs.

4 Mrs Mathibe laid a complaint with the Law Society, alleging that the respondent had not told her of the payments he received, that she obtained confirmation of the payments from the RAF and confronted the respondent with the fact of the payments. She says that the respondent promised to pay her what he owed in February 2007 but failed to do so. She said that she had been unable to contact the respondent because he did not keep appointments or answer his telephone. Mrs Mathibe then appointed attorneys to recover the money she was owed. The respondent paid her R260 277,50 on 19

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[1] The second charge related to Mr Kekana, also a third party plaintiff whom the respondent is alleged to have overcharged and to whom he is alleged to have failed properly to account. However the gravamen of this charge was not adequately ventilated in the affidavits.

June 2007. Mrs Mathibe then withdrew her complaint against the respondent.

5 The respondent admits failing to account to Mrs Mathibe. But he says that they had become friends and he made her certain cash advances against the ultimate success of her claim which he was handling. He says that he fell into financial difficulties because he was unable to fund the renovations he was carrying out at his home. This, he says, he confided to Mrs Mathibe who then offered to lend him the money she hoped to recover but had by then not yet recovered in settlement of her claim against the RAF.

6 Indeed, the respondent goes further. He said he had reservations about the ethics of borrowing money from a client under these circumstances. So, he says, he consulted a "senior attorney" who told him that it was "not unethical" to obtain loans from clients but that the practice was "highly frowned upon". The respondent does not divulge whether he asked why the practice of taking loans from clients should be frowned upon if it was not unethical to do so. Nor does he suggest that he asked about the basis on which such practice should have been frowned upon. The respondent provided neither the name of the alleged senior attorney nor the date on which this remarkable advice was allegedly given to him.

7 Be that as it may, the respondent further maintains that on 27 July 2005, he accepted Mrs Mathibe's offer to lend him the proceeds of her claim. The loan was to be for three months, free of interest because the respondent had given Mrs Mathibe advances on her claim free of interest.

8 Mrs Mathibe's claim against the RAF was settled on 1 September 2005. The court order reflecting the settlement provided for four monthly payments of R120 092,50, amounting in all to R480 370 during the period September 20 December 2005. The respondent says that at a consultation on 5 September 2005 Mrs Mathibe agreed that the respondent could borrow all the money he had received on her behalf, which he proceeded to do, as and when he needed it for his renovations.

9 However, in December 2005, the respondent had not received the bond finance for which he was hoping, apparently because of his poor credit record. He says he then arranged an appointment with Mrs Mathibe and explained the position to her.

10 The respondent attached to his answering affidavit an affidavit by Mrs Mathibe herself in which she stated that she had read the opposing affidavit of the respondent and purported to "confirm the correctness

[of the opposing affidavit of the respondent] insofar as it refers to me." I regard this confirmatory affidavit as wholly valueless. There is a detailed affidavit by Mrs Mathibe delivered as part of the Law Society's replying affidavit affirming her version as conveyed in her original complaint against the respondent and denying the loan.

11 As these are motion proceedings and there are disputes of fact, the *Plascon-Evans* rule applies. The starting point is that where there is a dispute as to the facts, final relief such as that being sought in this application should only be granted if the facts as stated by the respondent together with the admitted facts in the applicant's affidavits justify such an order. Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted. In certain instances, however, the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact. Where the allegations or denials of the respondent are so far-fetched or clearly untenable, the court is justified in rejecting them merely on the papers.[2]

12 Recognising that the truth almost always lies beyond mere linguistic determination, the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set

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2 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 A 634F-635C.

up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers. A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him or her. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. A court will have such difficulty "generally" because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party.

But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.[3]

13 The test, however, is a stringent one. Often, after evidence has been led and tested by cross-examination, things turn out differently from the way they might initially have appeared.[4]

14 In my view, the version of the respondent is unacceptably bald. I have mentioned that he has not disclosed the name of the "senior attorney" who allegedly advised him that his proposed conduct was ethically permissible although highly frowned upon. Had the respondent's version been genuine, I have no doubt that he would have not only disclosed the name of his advisor, but also tried to obtain an affidavit

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3 *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 3 SA 371 SCA paras 12-13

4 *National Scrap Metal (Cape Town) (Pty) Ltd and Another v Murray and Roberts Ltd and Others* 2012 5 SA 300 SCA para 22

from him. The respondent does not suggest that he asked why such conduct should be frowned upon if it was not unethical.

15 It is incumbent on a party who relies on the alleged fact of legal advice as a defence or as mitigation to give a full account of the advice allegedly received and to produce the evidence of the alleged advisor if such be available. That proposition is self-evident and has been consistently affirmed by the courts.[5] The account of the advice allegedly given to the respondent is anything but full.

16 If there had been a loan, the respondent would in some form or another have made a record of its terms or, at the very least, of its existence. He would have accounted to Mrs Mathibe so that if there ever were any dispute as to the existence or the terms of the alleged loan, he could produce the writing as proof of the transaction. When Mrs Mathibe instructed attorneys to recover what was owing to her from the respondent, the respondent would have written to the attorneys to explain his position. Even when he was pressed for the money, he did not account. The probabilities are strongly against the respondent. It is most unlikely that Mrs Mathibe, who when she laid her complaint with the Law Society worked for Kentucky Fried Chicken

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5 See *R v Meischke's and Another* 1948 3 SA 704 A 711; *S v Abrahams* 1983 1 Sa 137 A 146g; Heg Consulting Enterprises (Pty) Ltd and Others V Siegwart and Others 2000 1 SA 507 C 522B

in Pretoria North, would have agreed to lend the respondent her entire award from the RAF and that without any provision for interest. There is not a single scrap of paper to support the respondent's version. Nor is there anything to suggest that the respondent ever advanced his version of a loan before he deposed to his answering affidavit in the present application on 31 October 2008.

17 In Mrs Mathibe's case too, the RAF was ordered to pay her party and party costs. The respondent's answering affidavit is silent as to whether he taxed a bill and recovered these costs. In my view, especially given the respondent's precarious financial position, he would not have overlooked this chance of bringing in some more money. The strong probability, to put it at its lowest, is that the respondent indeed recovered the party and party costs but did not account to Mrs Mathibe for this sum.

18 To this day, the respondent has not accounted in any form to Mrs Mathibe. In my view, the only acceptable inference to be drawn from this failure, within the context of the present proceedings, is that the figures of a proper accounting would not bear out the respondent's version of a loan, with a subsequent temporary inability to pay, followed finally by payment in full.

19 In my view, for the reasons given, the respondent's version falls to be rejected on the papers. It therefore follows that he has been shown to have misappropriated the proceeds of Mrs Mathibe's claim and to have advanced an untruthful defence in an attempt to escape the consequences of his actions.

20 The conduct which in my view has been established against the respondent demonstrates that he is not fit to remain on the roll of attorneys.

21 Even on the respondent's own version, which I have rejected on the papers, he is not a fit and proper person to remain on the roll of attorneys. On that version, well knowing himself to be a poor credit risk, he allowed Mrs Mathibe to agree to a loan of her entire award with nothing on paper to prove the alleged fact or the terms of the loan, without interest and without security, though he believed that his doing so was highly frowned upon by the profession.

22 On the respondent's version, he put himself into a position in which his own interests conflicted with those of his client and created a situation highly advantageous to himself and strongly prejudicial to the interests of Mrs Mathibe. He has never accounted to her, which means that the actual amount of the alleged loan, which only the

respondent could know,[6] has never been identified. Indeed, to this day, the actual amount of the alleged loan remains unknown. Although the alleged loan was only for a period of three months from 27 July 2005, he only repaid her on 19 June 2007. Such conduct is so reprehensible that it warrants the removal of the name of the respondent from the roll of attorneys.

23 The respondent has not suggested that he is aware of the impropriety of his conduct. The respondent's attitude in his answering affidavit was that he had done nothing wrong. He asked in his answering affidavit that the application be dismissed, with attorney and client costs against the Law Society. Although counsel for the respondent conceded during argument that the respondent had been guilty of unprofessional conduct, no apology or other indication that the respondent had appreciated the error of his ways or was capable of reforming himself was forthcoming during the hearing. On any basis, an order merely suspending the respondent from practising for a specified period would be inappropriate.

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6 Because the amount of the alleged loan was the difference between the capital sum plus what was recovered on the party and party bill, less what was owed to the respondent for advances, fees and disbursements.

24 An order is made striking the respondent's name off the roll of attorneys in terms of prayers 1 to 12 inclusive of the notice of motion.

NB Tuchten
Judge of the High Court
13 September 2012

I agree.

S Desai
Judge of the High Court
13 September 2012

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