IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA

Case Number: 33739/2016

DELETE WHICHEVER IS NOT APPLICABLE		
(1)	REPORTABLE:	~~YES~~/NO
(2)	OF INTEREST TO OTHER JUDGES:	~~YES~~/NO
(3)	REVISED	
	DATE:	23 May 2017
	SIGNATURE:	

25/5/2017

In the matter between:

HERMANUS JOHANNES WESSELS BOTHMA — First Applicant

BOTHMA INCORPORATED — Second Applicant

and

THE LAW SOCIETY OF THE NORTHERN PROVINCES — Respondent

In re:

THE LAW SOCIETY OF THE NORTHERN PROVINCES — Applicant

and

HERMANUS JOHANNES WESSELS BOTHMA First Respondent

BOTHMA INCORPORATED Second Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] This is an interlocutory application for the setting aside of a resolution ("the resolution") taken by the council of Law Society of the Northern Provinces ("the Law Society") to launch an application for the striking of the first applicant's name from the roll of attorneys ("the main application").

[2] The application is brought in terms of the Promotion of Administrative Justice Act, 3 0f 2000 ("PAJA) and the applicants, seek the following relief:

"1. The review, in terms of section 6(2)(b) and/or 6(2)(c), and/or 6(2)(e)(iii), (iv) and (vi)and/or 6(2)(f)(i) and/or 6(2)(f)(ii) and/or 6(2)(h) and/or 6(2)(1) of the Promotion of Administrative Justice Act, 3 0f 2000 (as amended)("PAJA"), of the administrative action recorded in the resolution taken by Respondent's council on the 30th day of March 2016, to launch the main application against Applicants and for the relief sought herein, on the grounds that the decision underlying the

said administrative action is unlawful, unreasonable, procedurally unfair and therefore irrational.

AND claims an order in the following terms:

1. *That the administrative action referred to in paragraph 1 supra be and is hereby reviewed and set aside in terms of section 8(1)(c)(i) of PAJA;*
2. *That it be ordered in terms of Section 8(1)(c)(i) of PAJA that the Respondent pursue and exhaust the disciplinary proceedings provided for in the Attorneys Act 53 of 1979 (as amended) pending against Respondents* (sic), *to the final determination thereof;*
3. *In the alternative to prayers 1 and 2 supra and in the event of prayers 1 and 2 not being granted and in that event only, it be ordered that:*
   - *3.1 The non-compliance by Respondents in the main application to file their answering affidavit(s) timeously on or before the 8th June 2016 be and is hereby condoned and that the period for filling such answering affidavit(s) on the merits be and is hereby extended in terms of Rule 27 with a period of 30 days from date of this order;*
4. *That the Court make such order as to costs as it deems appropriate;"*

BACKGROUND

[3] The first applicant was admitted and enrolled as an attorney of this court on 20 November 1979. The first applicant is presently practising as a sole practitioner and director of the second applicant's firm. From the contents of

the founding affidavit in the main application, it appears that the firm specialises in claims against the Road Accident Fund ("RAF").

[4] From July 2012 until 1 March 2016, the Law Society received no less than 31 complaints from erstwhile clients of the firm. The complaints are mainly based on the allegations that the firm did not properly account to its clients and that the clients did not receive the full amount of compensation due to them. I pause to mention, that each and every complaint was forwarded to the first applicant in order to afford him an opportunity to respond thereto.

[5] The Law Society instructed Ms Magda Geringer ("Geringer") to investigate the complaints received from clients of the firm. Geringer investigated the claims received from 2012 to 2016 and prepared an extensive report consisting of some 65 pages. Geringer came to the following conclusion in her report dated 11 March 2016:

> *"9.2 Conclusion*
>
> .....
>
> *9.2.1 From my investigation I am of the view that the member did not act in the best interest of his clients and it is clear that he is financing his farming trust from the capital received on behalf of clients from the RAF which is highly irregular. There does not appear to be any benefit for his clients as I could find no*

indication on the matters investigated that interest was at any stage paid to any of his clients when he finally accounted to them although the loan agreement indicated that interest will be paid.

9.2.2 As the money was lent to the Trust in terms of loan agreements it is doubtful whether the Attorneys Fidelity Fund will be liable for payment to any of the clients if the Trust is not in a position to repay the loans to any clients and there is thus a large risk for the member's current clients and future clients.

9.2.3 From the above it appears that the member acted in his own interest when drafting the Powers of Attorney and entering into unsecured loan agreements with himself. There is no indication that he acted in the best interest of his clients.

9.2.4 I am of the view that the member's conduct was highly irregular and I doubt whether he can still be deemed fit and proper to practise as an attorney and am of the view that urgent steps should be taken against him to protect the public against any further risks."

[6] Prompted by the findings in Geringer's report, the Council of the Law Society resolved on 30 March 2016 to launch the main application.

[7] It is the aforesaid resolution that forms the subject matter of the interlocutory application.

LEGISLATIVE FRAMEWORK

[8] The attorneys' profession is regulated by the Attorneys Act, 53 of 1979. Chapter 1 of the Act provides for the admission and removal of attorneys from the roll of attorneys. Section 15 deals with the admission of attorneys and explicitly states in subsection (1)(a) that:

> *"15(1) Unless cause to the contrary to its satisfaction is shown, the court shall on application in accordance with this Act, admit and enrol any person as an attorney if-*
>
> *(a) such person, in the discretion of the court, is a fit and proper person to be so admitted and enrolled;"* (own emphasis)

[9] The section clearly confers the right to admit attorneys on the court. The Law Society may oppose an application for the admission of an attorney and may bring certain facts to the attention of the court who presides over the application for admission, but it does not have the authority to strike an attorney from the roll of practising attorneys or to suspend an attorney from practising.

[10] Taking into account that an attorney upon her or his admission becomes an officer of court, the discretion conferred upon a court to admit an attorney is vital to the proper functioning of the legal system. The administration of justice would be in serious jeopardy if the court did not have the discretion to admit its own officers on the grounds that such persons are fit and proper to practise as officers of court. This authority conferred upon the court ensures, even more importantly, that the public is protected against persons that are unfit to render legal services to the public at large.

[11] The duty to ensure that fit and proper persons are admitted to practise as attorneys does not cease once a practitioner enters practice. The duty remains on the court throughout an attorney's career to ensure that his or her practice complies with the high standards expected of a legal practitioner.

[12] To this end, section 22(1)(d) of the Act 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 suspend from practice by the court within the jurisdiction he or she practises-*

> *(d) if he or she, in the discretion of the court, is not a fit and proper person to continue to practice as an attorney;"* (own emphasis)

[13] The Law Society plays a complementary role in ensuring that attorneys act with integrity and are complying with the high standards demanded of their profession.

[14] For present purposes the provisions of sections 71, 72 and 73 read with section 22 is relevant.

[15] Section 22 has been referred to *supra.* Section 71 prescribes the process to be followed in cases of alleged unprofessional or dishonourable or unworthy conduct. The section provides that the council of the Law Society may inquire into cases of alleged unprofessional or dishonourable or unworthy conduct on the part of an attorney. In terms of the section persons may be summoned and questioned in respect of the alleged misconduct and consequently an attorney has the right to direct questions at any person that is so summoned.

[16] Section 72 prescribes the disciplinary measures the council may invoke, once a practitioner has been found guilty. The striking off or suspension of an attorney from the roll is not included in the disciplinary powers conferred upon the council. This power remains in the sole domain of the court.

[17] Section 73 confers the right on an attorney who had been found guilty of misconduct the appeal to a competent court against the finding.

[18] It is in terms of the aforesaid statutory exposé that the relief sought by the applicants needs to be considered.

PAJA

[19] Mr Rossouw SC, counsel for the applicants, contended that the resolution by the Law Society constitutes administrative action within the meaning of section 1(a) and (b) of PAJA. In this regard, Mr Rossouw SC relied, *inter alia*, on the decision in *Law Society of the Northern Provinces v Le Roux* (185/2015) [2015] ZASCA (26 November 2015).

[20] Once the decision constitutes "administrative action" within the meaning of the Act, the administrative action must be fair as contemplated in section 3 of PAJA.

[21] According to Mr Rossouw SC complying with the provisions of PAJA would entail that the Law Society must first exhaust its disciplinary processes, which

include an appeal process, prior to the launching of an application to strike or suspend an attorney.

[22] Mr Rossouw SC, furthermore, contends that the Law Society in not affording the first applicant an opportunity to participate in an inquiry as envisaged in section 71 and the consequent penalty process in terms of section 72 as well as the appeal procedure in section 73, failed to comply with the provisions of PAJA. The applicants are therefore entitled to an order setting aside the resolution of the council.

[23] Ms Magardie, appearing on behalf of the Law Society, drew the court's attention to the matter of *Law Society of the Northern Provinces v Soller* 2015 JDR 0339 (GP) in which a similar point was raised.

[24] Having had regard to the provisions of sections 71, 72 and 22 of the Act, the court at pages 6-7 held as follows:

> *"Quite apart from the aforegoing, the present proceedings are disciplinary proceedings conducted by this court-*
>
> > *'Hierdie Hof het inherente jurisdiksie om te beslis oor die geskikdheid van prokureurs. Sy jurisdiksie ontleen hy nie uitsluitlik aan a.22 van die Wet op Prokureurs nie. Law Society of the Cape of Good Hope v C 1986 (1) SA 616 (A) op 638 C – 638 F. Kyk ook Presskin v The Incorporated Law Society 1966*

(3) SA 719 (T), waarin beslis is dat die Hof inherente jurisdiksie het om prokureurs toe te laat. Dit volg dat waar hierdie Hof hierdie bevoegdheid het, die Hof ook die applikant kan toelaat om die nodige gegewens voor hom te plaas. Hierdie Hof het die bevoegdheid om sy eie prosedure te reël. Dit is per slot van rekening 'n dissiplinêre ondersoek, nie 'n siviele geding nie. Die vraag of die jurisdiksie wat die applikant aan a.22 van die Wet op Prokureurs ontleen geldig is, is dus nie wesenlik nie. Die geskilpunte draai om die geskiktheid van die respondent om as prokureur te praktiseer nie om die applicant se locus standi nie.....'

It follows that the respondent has no right to insist upon a disciplinary enquiry being held prior to steps being taken for his removal from the roll. In fact, this Court could mero motu initiate steps to strike the respondent's name off the roll of attorneys, and could do so, albeit notionally, without reliance upon applicant's co-operation or, indeed, against the applicant's wish."

[25] Notwithstanding the aforesaid authority, Mr Rossouw SC, submitted that the provisions of PAJA in relation to the Act, have never been properly considered by a court. Mr Rossouw SC invited this court to interpret the Act in

such a way that the provisions of PAJA should first be complied with prior to the launching of an application in terms of section 22 of the Act.

[26] Although the arguments in support of Mr Rossouw SC's submissions are in some instances quite novel, it is not necessary to consider the arguments *in casu*.

[27] Any finding in respect of the applicability of PAJA in relation to the Act, would, in the present circumstances, be academic. The complaints and findings contained in the main application raise serious questions in respect of the first applicant's fitness to continue practicing as an officer of this court. I am of the view that the main application should be disposed of as soon as possible. The court would fail in its duty to the judiciary, the profession and more importantly the public, if the disconcerting allegations against the applicant are not promptly investigated by the court.

[28] Mr Rossouw SC expressed his concern that the applicants will not be given a fair hearing if the disciplinary processes of the Law Society are not exhausted prior to a court hearing. The concern is unfounded. The rules of court make ample provision for a fair hearing. The applicants are granted sufficient opportunity to file an answer to the allegations contained in the founding

affidavit. Should such answer raise a real dispute of fact, the dispute may, in the discretion of the court, be referred to oral evidence.

[29] Having exercised its discretion to hear the main application, any finding on the interlocutory application will have no practical effect and be purely academic.

[30] Our courts, as a rule, do not deliver judgments that are only of academic interest.

[31] This much was confirmed by Kirk-Cohen J in *Du Plessis v Prokureursorde, Transvaal* 2002 (4) SA 344 T at 350 C – G.

[32] In my view, the relief pertaining to the review of the council of the Law Society's resolution should be dismissed.

ALERNATIVE RELIEF

[33] Ms Magardie, quiet correctly, conceded that the applicants should be afforded an opportunity to file an answer to the allegations contained in the founding affidavit. In the premises, an order in terms of the alternative relief claimed by the applicants should follow.

COSTS

[34] Mr Rossouw SC did not advance any reasons why the customary cost order in these types of applications should not follow. The Law Society as the *custos modum* of the attorney's profession is obliged to bring facts pertaining to alleged unworthy or unprofessional conduct of its members to the attention of the court. Conversely it should not be out of pocket and a cost order on an attorney-client scale should follow.

ORDER

[35] In the premises, I propose the following order:

1. The interlocutory application is dismissed.
2. The non-compliance by Respondents in the main application to file their answering affidavit(s) timeously on or before the 8th June 2016 be and is hereby condoned and the period for filling such answering affidavit(s) on the merits is extended in terms of Rule 27 with a period of 30 days from date of this order;
3. The applicants are ordered to pay the costs of the application on an attorney and client scale.

JANSE VAN NIEUWENHUIZEN J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.

MOLOPA J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

APPEARANCES

Counsel for the Applicant:	Advocate D.P.J. Rossouw SC
Instructed by:	Gross, Papadopulo and Lombard Attorneys
	Ref : No: BOT6/0001
	(012 362 3026)
Counsel for the Respondent:	Ms S.L. Magardie (with right of appearance)
Instructed by:	Damons Magardie Richardson Attorneys
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