

THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

Case no: 5722/13

In the matter between:

THE CAPE BAR COUNCIL

Applicant

And

ROELOF STEPHANUS VISSER

Respondent

Before: T Ndita, J et PAL Gamble, J

Date of hearing: 23 August 2013

Date of Judgment: 27 August 2013

JUDGMENT

NDITA; J

[1] This is an application by the Cape Bar Council for an order striking the name of the respondent from the roll of advocates of this Court on the ground of misconduct. The respondent was admitted to practise as an advocate on 13 July 2000. The charges brought by the applicant against the respondent are the following:

1. that he took instructions from a member of the public directly;

2. that he undertook to perform the functions of an attorney;
3. that he took money from the complainant and did not deposit the money into a trust account;
4. that he refused to return the money to the complainant despite request;
5. that he failed to account for the money so received to the complainant;
6. that he failed to respond to letters sent to him by the applicant or provide an explanation.

The main charge against the respondent is that he accepted instructions from a client without the intervention of an attorney whereas as an advocate he was not permitted to do so.

[2] The application is unopposed. The respondent was served with the notice of motion and founding papers personally by the Sheriff of this Court on 24 April 2013. It is common cause that the respondent is not a member of the Cape Bar, or any of the constituent bars of the General Council of the Bar of South Africa ("the GCB"). In *De Freitas v Society of Advocates of Natal* 2001(3) SA 750 (SCA) at 756 the Court accepted that Courts have inherent disciplinary powers over practitioners in cases of misconduct or unprofessional conduct irrespective of whether or not they are members of a Bar.

[3] In order to fully comprehend the nature of these proceedings, it is necessary to briefly summarise the material facts which led to the bringing of this application by the applicant Council.

[4] The profession of advocates is governed by the Admission of Advocates Act 74 of 1964 ("the Act"). In terms of s 3(1) of the Act, one of the prerequisites for admission is that the court must be satisfied that the person is fit and proper to be admitted to the ranks of the profession and authorised to act as an advocate. In *General Council of Bar of SA v Geach* 2013 (2) SA 52 at 74 para 78, Nugent JA explained that:

"The Act is directed to regulating who may practise in the courts. In essence it provides that a court may permit a person to do so, and it may also withdraw that permission, whether permanently by striking off, or temporarily by suspension."

It has long been recognised and accepted that the Bar in this country is a referral profession. However, the referral practice is not that advocates may not under any circumstances accept instructions directly from clients, various exceptions are allowed, but the conduct complained of in the matter at hand does not fall within the range of those exceptions. The referral practice has been held to serve the best interests of the profession and the public in litigious as well non-litigious matters. (See *De Freitas* para 6-7). In addition Hefer ACJ in para 11 of *De Freitas* stated that there is, moreover, a more obvious reason why an advocate should not perform the functions of an attorney. It is that, unlike attorneys, advocates are not required to keep trust accounts and as such a client who does not employ an attorney and instructs an advocate directly does not have the same protection or any protection at all.

[5] In terms of s 7(1) of the Admission of Advocates Act 74 of 1964 as

amended, a Court may suspend any person from practice, or order that the name of any person be struck off the roll, if it is satisfied that he/she is not a proper person to continue to practice as an advocate. In *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 A at 654 D-E it was reiterated that the procedure entails first a determination by the Court whether the alleged offending conduct has been established on a preponderance of probability and, if so, whether the person in question is a fit and proper person to practice as an advocate. Once there is a finding that he/she is not a fit and proper person to practise, he may, in the court's discretion be suspended or struck from the roll.

[6] I now turn to the charges levelled against the respondent. The founding affidavit deposed to by the Chairperson of the applicant, Mr Ismail Jamie SC, reveals that as early as September 2011, a complaint to the effect that the respondent had undertaken work reserved for attorneys and took money directly from a member of the public was brought to the attention of the applicant. The said complaint emanated from one Mr Enock Mathavele who alleged that he deposited an amount of R35 000 into the respondent's banking account, that being the purchase consideration of a property he wished to purchase from a certain Ms Melanie Haarhoff. According to Mr Mathavele, the respondent failed to attend to the transfer of the property and as a result the seller cancelled the sale. Despite demands for the repayment of the money, the respondent failed to oblige but kept promising that it would be paid the next day.

[7] On receipt of the complaint the applicant between 15 September 2011 and 30 November 2012 wrote numerous letters to the respondent drawing his attention to Mr Mathavele's allegations, but he failed to respond or furnish an explanation. By 15 November 2012, Mr Mathavele confirmed that he had not yet received the money he had paid into the account of the respondent. The respondent has in these proceedings, despite personal service of the notice of motion and founding affidavits drawing his attention to the hearing of this matter, failed to put any facts or defence negating Mr Mathavele's allegations, in short, there is no explanation of his conduct. In a letter dated 29 October 2012, sent by email, the applicant warned the respondent of the consequences of his failure to respond to the allegations and specifically stated that if he did not respond by 02 November 2012, the complaint would be considered in his absence.

[8] In my view, the offending conduct has been established on a preponderance of probabilities and the applicant has made a clear and sufficient case for the order it seeks, it had given the respondent adequate warnings of the consequences of his conduct but he ignored them. The conduct complained of shows dishonesty and a brazen disregard for the rules of the respondent's chosen profession. In addition to that, there is, in the present case, a serious aggravating feature. The respondent took money from a member of the public and did not even make an attempt to pay it back. In my view, the conduct falls squarely within the purview of the criminal offence of theft. Such conduct not only erodes the confidence the general public has in

attorneys and advocates, it brings the legal profession into grave disrepute. It follows that the respondent is not a fit and proper person to practice as an advocate. In view of all the circumstances I have no doubt that the appropriate order in this case is the removal of the respondent's name from the roll of advocates. Should Mr Mathavele wish to pursue criminal sanctions, the applicant is urged to extend to him whatever assistance may be necessary in pursuance of that objective.

[9] I now turn to the question of costs. The applicant has in both the notice of motion and founding affidavit asked for costs on attorney and client scale. I am not inclined to order the respondent to pay costs on the requested basis as in my view, he has not in the course of the litigation displayed any conduct which is deserving of a mark of disapproval by the court. During the hearing of this application, Counsel for the applicant, Mr Katz SC, referred the court to the *Geach* judgment wherein the respondents whose names were also removed from the roll of advocates, were ordered to pay costs on the scale as between attorney and client. The basis on which the order was made in the *Geach* matter is distinguishable from this case. First, one of the respondents had tendered the attorney and client costs. Second, the basis for such costs in respect of the rest of the respondents was that they had failed in their opposition to the GCB's contentions. The respondent in *casu* did not oppose the applicant's contentions.

[10] In the circumstances, the following order is issued.

1. The name of Mr Roelof Stephanus Visser (National Identity Number:) is removed from the roll of advocates;
2. Mr Visser is to pay the Cape Bar's costs of suit, including those occasioned by the employment of two counsel.
3. The Registrar is directed to forward a copy of the judgment to the Director of Public Prosecutions, Western Cape.

NDITA; J

I agree.

GAMBLE, J