IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

Case no: 223/2011
Date Heard: 26/5/11
Date Delivered:30/05/11

In the matter between:

THE LAW SOCIETY OF THE CAPE OF GOOD HOPE **APLLICANT**

Versus

MVAPHANTSI LUVUYO LAWRENCE **Respondent**

JUDGMENT

SMITH J:

[1] The Applicant, namely the Law Society of the Cape of Good Hope, seeks an order interdicting and prohibiting the Respondent from practicing as an attorney until such time as he had been issued with a fidelity fund certificate in terms of s. 41(1) of the Attorneys' Act, 53 of 1979 ("the Act"), and certain consequential relief.

[2] The matter first came before Stretch AJ on the 19th of May

2011 and was postponed to the 26th of May 2011 at the Respondent's request. The Respondent was ordered to file his answering affidavit, if any, by the 25th of May 2011.

[3] He duly filed his answering affidavit, but when the matter came before me on the 26th of May 2011, he sought a further postponement. There was however no formal application for the postponement and he made his submissions in this regard from the bar. His application for a postponement was based on the fact that his counsel, Adv *Mtshabe*, was not available to argue the matter. The application was however opposed by Mr *Wolmaran*s, who appeared for the Applicant. Mr *Wolmarans* submitted that due to the urgency of the mater and the fact that the Respondent would in the meantime be allowed to continue to practice in contravention of the law, no further postponement should be allowed. I was of the view that the Respondent had been allowed sufficient time to make arrangements for legal representation and that the potential prejudice to clients and members of the public is too great to allow a further postponement. I therefore refused the application and the merits were argued. The Respondent represented himself.

[4] Section 42(1) of the Act provides as follows:

> "A practitioner practising on his own account or in partnership, and any practitioner intending so to practise, shall apply in the prescribed form to the secretary of the society concerned for a fidelity fund certificate".

[5] S. 41(1) prohibits a practitioner from practicing on his own account or in partnership unless he is in possession of a fidelity fund certificate.

[6] It is common cause that the Respondent is not in possession of such a certificate. He states the following in his answering affidavit in this regard:

> "I opened on the 15 of January 2011 and started reorganising my office for 2011. I must submit that I could not be able to practice without a fidelity fund certificate and any suggestion that I was practising without it is merely an assumption. I am quite clear on the law that no attorney should practice without the fidelity certificate".

[7] Mr Mvaphantsi however took a number of points *in limine* which he submitted should result in the application being dismissed with costs.

[8] His first point *in limine* related to urgency. As I understand his argument in this regard he contended that because the Applicant brought the proceedings on an urgent basis, did not stipulate in the notice of motion a time period within which he should file his opposing papers and failed to file a certificate of urgency, the proceedings are fatally defective.

[9] I am of the view that there is no merit in this argument. I agree with Mr *Wolmarans* that these type of matters are inherently

urgent in nature. Members of the public who instruct or pay monies to a practitioner who practices without a fidelity fund certificate are exposed to serious prejudice. Central to the application for a Fidelity Fund certificate is also the submission of an audit report which certifies that attorneys' books of account and management of trust monies are in order. Where no such audit certificate is forthcoming it is in fact the statutory duty of the law society concerned to move expeditiously in order to protect the interest of clients and members of the public. In the event, Mr *Wolmarans* has submitted a certificate of urgency which in my view was in compliance with the relevant practice rule. Furthermore as I have stated earlier, the Respondent was given sufficient opportunity to oppose the matter. He can therefore hardly complain that he had been rushed into court and that the truncation of the time limits were not justifiable under the circumstances.

[10] The second point *in limine* was to the effect that the Applicant approached the court on the basis of final relief and not a *rule nisi*. It therefore effectively seeks a permanent interdict against him. I am of the view that this submission is also without any merit. The Applicant seeks an order interdicting the Respondent from practising for his own account or in partnership only for as long as he has not have been issued with the requisite fidelity fund certificate. To this extent he will be the master of his own destiny. If

he complies with the statutory requirements and is issued with the certificate the efficacy of the court order will immediately fall away.

[11] Regarding the merits of the application Mr Mvaphantsi argued that the Applicant has not proved that he has in fact been practicing as an attorney. His answering affidavit is however conspicuously silent in this regard. Nowhere does he state unequivocally that he is not practicing as an attorney. The closest that he came was to state that he was aware that it is against the law to practice without a fidelity fund certificate and that it is being assumed that he is in fact still so practicing.

[12] The evidence however suggests differently. Annexed to his affidavit is a letter which, on the face of it, suggests that even after he had received notice of the application, he still purported to act as the sole proprietor of Mzimba, Jubase and Company.

[13] The relief sought by the Applicant is in the event intended to interdict the Respondent from conduct which is illegal. It is furthermore imperative that the Applicant take possession and control of books of account, clients' files and other relevant documents which are presently with the Respondent. For this it requires judicial sanction. The Respondent was in my view not able to advance any cogent reasons why the relief should not be

granted. It appeared that he was solely intent on dragging the matter out for as long as possible.

[14] In the result I am of the view that the Applicant has made out a case for the relief which it seeks in the notice of motion and the following order shall therefore issue:

(1) An order in terms of prayers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the Applicants' Notice of Motion.

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J.E SMITH
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant	:	Mr Wolmarans
Attorney for the Applicant	:	N. N DULABH & CO 5 Betram Street GRAHAMSTOWN Ref: Mr Wolmarans
Counsel for the Respondent	:	Advocate Mtshabe
Attorneys for the Respondent:		Mili Attorneys Eskom Building 110 High Street GRAHAMSTOWN Ref: D. MILI/Zandi
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