

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 3460/2010

In the matter of

LAW SOCIETY OF THE FREE STATE

Applicant

and

PHALLANG MOSES KHALAKI

Respondent

CORAM: H.M. MUSI, JP *et* EBRAHIM, J

JUDGMENT: THE COURT

HEARD ON: 9 DECEMBER 2010

DELIVERED ON: 10 FEBRUARY 2011

[1] The applicant applies in terms of section 122(d) of the Attorneys Act, 53 of 1979 ("the Act") for the striking off of the name of the respondent from the Roll of Attorneys.

[2] The applicant has launched this application in the execution and achievement of the objectives referred to in section 58 of the Act, as amended, against the following common cause factual background.

- [3] During 2009, the respondent, an admitted attorney and member of the applicant, who practices for his own account under the name and style of Khalaki Attorneys, breached Rule 16 of the applicant Law Society's Rules, which, *inter alia*, regulates the general accounting requirements pertaining to attorney's trust accounts, by failing to submit an audit report for the year ending 28 February 2009, which was due on 31 August 2009, despite several requests therefor from the applicant.
- [4] On 17 September 2009, the applicant, in a faxed letter of demand gave respondent notice to submit his audit report on or before 12 October 2009, failing which he was summonsed to appear before the Compliance and Disciplinary Committee ("the Committee") on 20 October 2009 to furnish reasons why a recommendation to the Council should not be made by the Committee for the striking off of the respondent's name from the Roll of Attorneys, alternatively, for his suspension from practice.
- [5] The respondent appeared before the Committee on 9 December 2009 and explained that he did not submit the

audit report relating to his trust account timeously because:

5.1 he was a new practitioner and had expected to be reminded by the applicant that the report was due, and that, due to constraints, the submission of the report had slipped his mind; and

5.2 he had not received the faxed letter dated 17 September 2009 as he did not possess his own fax machine but received faxes from another office and could not access his faxes at the time the applicant's letter was faxed.

[6] The Committee resolved to refer the matter to the council for appropriate action to be taken and on 29 January 2010, the council resolved to launch the present application.

[7] Thus, notwithstanding the respondent's legal obligation to submit an annual audit report to the applicant, no such report was furnished nor did the respondent apply to the Committee for an extension of time within which to deliver such a report. This report is extremely vital as the accountant employed by an attorney has to certify in such report that he has inspected

the books and financial records of the practice concerned and that the attorney has complied with the provisions of Rule 16 pertaining to trust account records and trust account transactions.

[8] Moreover, in such circumstances it was not possible for the applicant to issue the respondent with a fidelity fund certificate, which, in effect, meant that the clients of the respondent would not have a right of recourse against the attorney's fidelity fund in the event of misappropriation of monies entrusted to the respondent. In addition, the applicant carried on practising in contravention of section 41 of the Act. The consequences of this conduct are that clients of the respondent and any potential clients are exposed to serious financial risk. The applicant accordingly contends that, on these grounds, the respondent is not a fit and proper person to practise as an attorney of this Honourable Court and should either be suspended or that his name should be struck from the Roll of Attorneys.

[9] In these proceedings the respondent concedes that his audit report is outstanding to date but raises the further defence that, because of financial constraints, he was unable to pay

the rental for his office premises and as a result, his landlord locked him out of his office in which his files and accounting records were kept, until August 2010, when he was able to access them and submit them to his auditors for the preparation of the audit report. From his oral submissions, it was understood by this court that the audit report has been prepared but the auditors have refused to release it to the respondent without payment of their fee. The respondent has advised this court that he has no money and is unable to borrow any. He admits his failure to submit the audit report for 2009 constitutes unprofessional conduct but denies that this conduct is wilful or that the failure to submit the report is wilful. He also denies that his clients are exposed to any financial risk as he has referred all of them to other practitioners and is no longer practising. He denies also that he is not a fit and proper person to practise. On that account, he urges this court not to strike his name off the Roll of Attorneys, as a proper case therefor has not been made out by the applicant.

- [10] In terms of section 22(1)(d) of the Act, an attorney may be struck from the Roll of Attorneys or suspended from practice

“if he, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney.”

The practical manner in which the court exercises this power is to hold a threefold enquiry - **JASAT v NATAL LAW SOCIETY** 2000 (3) SA 44 (SCA) at 51 B – I; **LAW SOCIETY OF THE CAPE OF GOOD HOPE v C** 1986 (1) SA 616 (A) at 637 E – G.

- [11] The first is a factual enquiry into whether the alleged offending conduct has been established. In the present matter this is common cause. Consequently the next enquiry is one where this court has to make a value judgment in deciding whether or not the respondent is a fit and proper person to continue practising as an attorney. Thirdly, and if the answer to the second enquiry is in the affirmative, this court must, in the exercise of its discretion, decide, on the totality of the circumstances of the case, whether the respondent is to be removed from the Roll of Attorneys or merely suspended from practice. The second and third leg of the enquiry involves the exercise of this court’s discretion.

[12] We deal first with the question of whether or not the respondent is a fit and proper person to continue to practise as an attorney. It was stated in **JASAT v NATAL LAW SOCIETY**, *supra*, at 51 E that the enquiry in this regard involves weighing up the offending conduct against conduct expected of an attorney. In our view, the respondent's conduct falls far short of conduct expected of an attorney. In the first place, he exhibits complete lack of knowledge of the running of an attorney's practice. This is typified by his defence that he did not know that he has to submit an audit report and that the applicant should have alerted him to it. This is an admission that he simply does not know the relevant provisions of the Attorneys Act as well as the rules of his own Law Society. This clearly marks him out as unfit to run an attorney's practice; certainly not for his own account. His failure to submit audit reports to the applicant and consequently to secure a fidelity fund certificate is attributable to the fact that he did not appreciate that these were essential for the running of an attorney's practice. Nor does he seem to appreciate the serious consequences of failure to comply with the provisions of the Attorneys Act and the rules, in particular, the seriousness of practising without a

fidelity fund certificate and that his default would open him up to a charge of unprofessional conduct.

[13] The respondent also displays a deplorable lack of knowledge of and experience in the conduct of civil proceedings. For example, his answering affidavit in the instant matter was served and filed way out of time, yet he did not apply for condonation. He applied for condonation only after an objection had been raised about the out of time answering affidavit and he did not even file a proper application for condonation. Also his condonation papers were not served on the other side before being filed at court. We had to grant him an indulgence at every turn and even postponed the matter on several occasions because we wanted to give him the opportunity to put his full version before court.

[14] The respondent's disclosure that he had failed to pay his rent leading to his landlord locking him out of his offices, is a matter whose seriousness eluded him. The closure of his office meant that he could not access his files and consequently the affairs of his clients were neglected for a considerable period. Failure on the part of an attorney to

meet his/her financial obligations amounts to unprofessional conduct that would also bring the attorneys' profession into disrepute.

[15] In a nutshell, the respondent's conduct falls far short of conduct expected of an attorney and he is not a fit and proper person to continue to practise as an attorney; at any rate, not for his own account.

[16] The final question is whether the respondent should be struck off the roll or merely suspended from practice. In our view, the respondent's offending conduct is not such that he should be struck off the roll. The most important consideration in this regard is that he has not rendered himself guilty of dishonesty. His default is basically a combination of lack of knowledge and experience in the running of an attorney's practice and naivety resulting probably from lack of maturity. He was still too young and inexperienced to stand on his own and, most importantly, he appears not to have been properly trained, if trained at all, in the running of an attorney's practice and indeed in the work of an attorney generally. He displays a deplorable lack of the

skills expected of an attorney. Whoever was his principal as a candidate attorney, must take part of the blame in this regard. Furthermore, the respondent clearly lacks the financial resources to run his own practice and he blundered by trying to do so. During the hearing we impressed on him that he needs to work in an established firm to gain the necessary practical experience, whilst at the same time building up some capital to enable him to stand on his own, should he in future want to again practise for his own account.

- [17] In our view, the appropriate sanction in this matter is suspension from practice on appropriate terms and conditions. Compare **A v LAW SOCIETY OF THE CAPE OF GOOD HOPE** 1989 (1) SA 849 (A); **REYNEKE v WETSGENOOTSKAP VAN DIE KAAP DIE GOEIE HOOP** 1994 (1) SA 359 (A); **LAW SOCIETY OF THE CAPE OF GOOD HOPE v PETER** 2009 (2) SA 18 (SCA).

- [18] The following orders are granted:

18.1 The respondent is suspended from practice as an attorney for a period of twelve months from date of this

order, subject to the following conditions:

- 18.1.1 That he shall within 90 (ninety) days of this order, submit to the applicant the trust audit report in terms of Rule 16 of the applicant's rules for the 2009 financial year of his attorney's practice under the name and style Khalaki Attorneys, failing which the applicant shall reinstate the application on any Thursday for reconsideration thereof, upon twenty days service of the notice of set down on the respondent.
- 18.1.2 Should the respondent submit an audit report as stipulated above, the applicant shall issue and file with this court a certificate confirming that a valid audit report has been submitted.
- 18.1.3 Upon compliance with the immediately preceding paragraph, the respondent's suspension shall lapse; provided that the respondent shall not be issued with a fidelity fund certificate and shall not practise for his own account for a period of 12

(twelve) months from date of the lifting of
the suspension.

18.2 The issue of costs is held over for consideration should
the matter be reinstated on the roll as provided for in
paragraph 18.1.1.

H.M. MUSI, JP

I concur.

S. EBRAHIM, J

On behalf of applicant:

Adv. A. Bester
Instructed by:
Matsepes Inc
BLOEMFONTEIN

On behalf of respondent:

In person

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