IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 1990/2018

In the matter between:

SENEKAL FJ Applicant

and

LAW SOCIETY OF THE FREE STATE Respondent

HEARD ON: 10 MAY 2018

JUDGMENT BY: POHL, AJ

DELIVERED ON: 8 JUNE 2018

I INTRODUCTION

[1] The applicant, an attorney of this Court, sought interim relief against the respondent, being the Law Society of the Free State, pending the outcome of review proceedings.

II THE RELIEF CLAIMED

[2] Save for a prayer for condonation based on urgency which is not repeated, applicant sought the following relief ex facie the notice of motion:

> "2. That a rule nisi be issued calling upon the respondent to show cause, if any, on ……. why an order in the following terms should not be made and confirmed:
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> 2.1. That the respondent be interdicted and restraint from proceeding with the disciplinary proceedings against the applicant brought by the respondent against applicant under and/or in terms of the Attorneys Act, 53 of 1979 and/or the rules for the attorneys' profession promulgated in Government Gazette No 39740 dated 26 February 2016 on the 20th of April 2018 and/or any subsequent date; *in the alternative,* commence afresh with disciplinary proceedings against the applicant under and/or in terms of the Attorneys Act….and/or the rules for the attorneys profession……, pending finalization of the application launched by the applicant in this Court under case number **1953/2018** to review and set aside the resolutions and/or declaring invalid certain resolutions passed and/or taken by the respondent in relation to the disciplinary proceedings brought by the respondent against the applicant, as well as a further order directing the respondent to furnish the applicant with the documentation in terms of the Promotion of Access to Information Act, 2 of 2000; and
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> 2.2. That the respondent be ordered to pay the costs of this application on an attorney and client scale, in the event of opposing this application.

3. That prayer 2.1 above serves as an interim interdict with immediate effect pending the finalization of this application."

III BACKGROUND AND CHRONOLOGY

[3] On 20 April 2018, Mr Phalatsi, who appeared in this matter for the respondent, gave an undertaking that the respondent will not proceed with the disciplinary proceedings against the applicant, pending the finalization of this matter. By agreement between the parties, I made that undertaking an order of Court when I then further ordered, again by agreement, the postponement of the matter to 10 May 2018, with truncated times for the filing of opposing and replying affidavits and heads of argument.

[4] The applicant was represented by Adv. L Halgryn SC, assisted by Adv. C Snyman and as mentioned before, the respondent was represented by Mr N W Phalatsi.

[5] On 3 May 2018, the applicant gave notice in terms of rule 28 of the Uniform Rules of Court, of his intention to amend his notice of motion to the effect that an additional prayer be inserted which will then read as follows:

"4. Declaring subsection (6) of section 72 of the Attorneys Act, 53 of 1979 is inconsistent with the Constitution and invalid;"

At the outset of the argument in this application, Mr Halgryn indicated to the Court that the applicant withdraws the proposed amendment and that the applicant will probably seek such relief in

the review application. The respondent in any event opposed the amendment and the applicant also did not comply in this application before me with Rule 10A of the uniform rules of Court. The withdrawal of the proposed amendment however obviated the need to deal with these aspects.

[6] On 24 March 2017, Lever AJ, made two orders in the High Court, Northern Cape Division, Kimberley in case number 2496/16, in which he referred certain aspects to the respondent, the Free State Law Society, to determine whether or not the applicant acted in an unprofessional manner and misled the Court in that case, where the applicant was one of the parties. The relevant portions of the two orders read as follows:

> "3. In matter no 2616/16 the matter is referred to the free state Law Society to determine whether Mr. Senekal, the 3rd Respondent misled the court or acted in a manner inconsistent with his professional obligations to this court on the following issues:
>
> (a) The contentions made in the founding affidavit at pp 63679, specifically paragraphs 122, 123 and 124 in relation to the allegation that 2nd and 3rd Respondents were misappropriating the funds of the 1st Respondent (Kimcrush). The answer to such allegations which appear at page 788 of the record specifically paragraphs 37 and 38. The reply thereto that appears at pp 999 – 1012 specifically paragraph 11 thereof.
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> (b) The matter of Senekal in full knowledge of the interdict on the bank account of Kimcrush (Pty) used the Trust account of his firm, Matsepes, in order to circumvent the said interdict by Kimcrush (Pty) Ltd to pay their debts into the relevant trust account. Further allowing such trust account to be used as a business account.

2. The question of whether Mr Senekal misled this court is referred to the free state law society with specific reference to paragraph 5.5 up to and including paragraph 5.9 of this founding affidavit red with the opposing affidavit of Mr Pan which appears at pages 1194 to 1199 in case no 2616/2016."

[7] On 23 May 2017, the applicant received a letter from the respondent, advising the applicant that the Council of the Respondent has resolved on **19 May 2017,** to proceed with an application to strike the applicant from the roll of attorneys after the above mentioned referral to it from Lever AJ. I shall herein after refer to this resolution as "the first resolution".

[8] On 28 June 2017, the applicant was notified by the respondent that the respondent's Council took another resolution on **23 June 2017,** to the effect that the applicant must appear before the Council to give reasons why the Council should not proceed to bring an application to remove the applicant's name from the roll of attorneys. I shall herein after refer to this resolution as "the second resolution".

[9] On 24 May 2017, the applicant wrote a letter to the respondent in reply to the letter in which he was informed of the first resolution. In this letter the applicant informed the respondent that he did not have a chance to place his version before the Council prior to the Council of the respondent reaching its first resolution. He indicated that he throughout laboured under the impression that he be afforded that opportunity and that rule 50 of the rules, governing

disciplinary proceedings for the attorneys profession (published in a Government Notice), would be adhered to and applied in this instance. He placed on record that according to him, the resolution was taken in contravention of his rights.

[10] The applicant, through his attorney, wrote a letter to the respondent on 26 May 2017 and also filed a formal request for documentation in terms of the Promotion of Access to Information Act, Act 2 of 2000.

[11] When the applicant received the notice of the second resolution, the respondent informed him that the respondent's council will only after the applicant's appearance before it, consider the production of the information requested in terms of Act 2 of 2000.

[12] The applicant then received notice from the respondent to appear before it on 21 September 2017, as envisaged by the second resolution. Due to the unavailability of the applicant's counsel, this meeting did not take place and was postponed by agreement, although no date was fixed. The applicant's attorney however indicated to the respondent that the applicant requires the documentation requested, prior to him appearing before the council.

[13] The applicant then received a letter dated **2 February 2018**, from the respondent. This letter informed the applicant to appear before the respondent's council on 23 February 2018 to give reasons why the council should not proceed with the applicant's "suspension" application. The letter specifically referred to a charge sheet

annexed to it. The charge sheet referred to a resolution adopted by the respondent's council, which was taken on **13 December 2017** that the applicant should appear before the council and give reasons why he should not be removed from the roll of attorneys, alternatively suspended from practice. This resolution will be referred to herein later as "the third resolution". The said charge sheet contained the two matters referred by Lever AJ and a third complaint lodged by one Claassen and Joluza Boerdery (PTY) LTD.

[14] The applicant then wrote a letter to the respondent on 12 February 2018, requesting a formal hearing (in terms of the provisions of rule 50 (12) of the disciplinary proceedings, referred to above.). The applicant also requested a postponement of the appearance scheduled for 23 February 2018. The respondent replied in a letter dated 21 February 2018, in which the request for a formal enquiry was denied. In this letter, the respondent itself, referred to the provisions of rule 50.6.2.2. The respondent said that in terms of that rule, the applicant is called upon to come and furnish reasons why the application to strike or suspend him should not be proceeded with. The respondent then rescheduled the appearance of the applicant to 8 March 2018. The matter did not proceed on 8 March 2018.

[15] On 6 April 2018, the applicant received a further notice from Me Tumelo Leope, the acting director of the respondent in which the applicant were informed that the date for his appearance is now scheduled for **20 April 2018**, for written or oral submissions and

indicated that it is an absolute final postponement. This notice was never retracted before this matter served before this Court.

[16] On 13 April 2018, the applicant's attorney again wrote to the respondent, requesting a postponement of the proceedings to be held on 20 April 2018. The reasons stated in the letter were that the applicant still has not received the documents he requested in terms of his request for same in terms of Act 2 of 2000, that he needs same to prepare and that the procedure the respondent is following is procedurally and administratively unfair. Me Leope of the respondent replied on 17 April 2018 by letter stating that the Councillors will, on **20 April 2018,** consider the contents of the applicant's attorneys letter dated 13 April 2018.

[17] Since the letter of Me Leope dated 17 April 2018 did not clarify if the respondent still requires the applicant to appear on 20 April 2018, the applicant's attorney phoned Me Leope on 17 April 2018 to seek clarity. Me Leope was however not prepared to go further than the wording of the letter of 17 April 2018.

[18] According to the applicant, he was therefore compelled to bring this urgent application for the above mentioned relief. He thus instructed his counsel to draw this application as well as the review and compel application, which was annexed to this application as an annexure. In the review application under case number **1953/2018,** which was issued on **18 April 2018,** the applicant in essence seeks to have the respondent's decision to bring an application to have his name struck from the roll, reviewed and set aside and he also wants the Court to compel the respondent to

furnish the applicant with the documentation requested in terms of Act 2 of 2000.

[19] On 20 April 2018, the matter was then postponed by me, which was done by agreement as indicated in paragraph [3], *supra*.

[20] During the course of the argument on 10 May 2018, Mr Halgryn handed up a Draft Order, which I have marked "X", as the order the applicant seeks from this Court. The draft order amounts to a clarification of what was sought in the notice of motion. In essence it remains an application for an interdict, pending the finalization of the application for review under case number **1953/2018.** It reads as follows:

> "1. The Respondent be interdicted and restrained from proceeding with the proceedings against the Applicant in terms of the notifications by the Respondent contained in annexure "S10" at page 84, annexure "S10.1" at page 85, annexure "S11" at page 86, annexure "S15" at page 89 to 96, annexure "S17" at page 99, annexure "T2" at page 107 and annexure "T3" at page 108 of the paginated papers pending finalization of the application launched by the Applicant in this honourable Court under case number 1953/2018; and
>
> 2. The Respondent be ordered to pay the costs of this Application on an attorney and client scale, including the costs of two counsel."

IV <u>REQUISITES FOR AN INTERIM INTERDICT</u>

[21] The requisites for an interim interdict are the following:

(a) a prima facie right, although open to some doubt;

(b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

(c) the balance of convenience favours the granting of an interim interdict and

(d) applicant has no other satisfactory remedy.

[22] It must be made clear that in order to evaluate the evidence and the submissions of the parties in order to establish whether the requisites, such as a prima facie right has been established, it is not required of this Court to adjudicate the application as if it is confronted with a review application. This in essence means that although I may come to certain conclusions which overlaps with certain aspects pertaining to the review application, my conclusions will obviously not bind the review Court.

V A PRIMA FACIE RIGHT

[23] At the heart of this application lies the Constitutional right to just administrative action as enshrined in Section 33 of the Constitution of the Republic of South Africa, which reads as follows:

> "33. **Just administrative action.** (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must-
(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and

(c) promote an efficient administration."

[24] The test to be applied in an application for an interim interdict pending the outcome of a review application was stated by Moseneke DCJ in **National Treasury and Others v Opposition to Urban Tolling Alliance and Others,** 2012 (6) SA 223 (CC) ("the **Outa** case") in the following terms:

"50. Under the Setlogelo test the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm.

[25] In the decision of **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others,** 2014 (4) SA 179 (CC) (the **Allpay** case), the following dictum by Froneman J in paragraph [42], is equally applicable to this matter before me:

"There can be no doubt that the separation of powers attributes responsibility to the Courts for ensuring that unconstitutional conduct is declared invalid and that constitutionally mandated remedies are afforded for the violations of the Constitution. This means that the Court must provide effective relief for infringements of constitutional rights."

[26] It must also be remembered that the Attorneys Act, Act 53 of 1979, predates the Constitution and the bill of rights enshrined in it. It is trite that when a Court interprets an act of Parliament it should do so with the spirit and purport of the Constitution of the Republic of South Africa in mind. This is of course applicable in this matter where the provisions of Sections 69, 71 and 72 of the Attorneys Act, Act 53 of 1979 is or may be relevant. These sections deal with the powers of the Council of the respondent, the enquiries by the Council and the disciplinary powers of the Council.

[27] In this context it is also important to have regard to the fact rule 50 of the rules for the Attorneys profession, which deals with disciplinary proceedings of the respondent and its Council, was promulgated in a Government Gazette No 39740 dated 26 February 2016. It thus has the power of subordinate legislation and must thus be adhered to where applicable.

[28] The crux of this matter lies in the following: It is common cause that when the respondent came to its first decision, it did so without affording the applicant a chance to present his version as to whether or not the Council can or should come to that decision or not. The question is therefore whether the applicant should have been afforded that opportunity or not. If he should have been

afforded that opportunity, the applicant's most fundamental right to put his version before the Council before the decision was made, was denied (Audi alteram partem). In that case, it must follow that the applicant has established that he has a prima facie right to the interim relief he is claiming in this application before me. Put differently, if there is a reasonable possibility that the applicant might succeed on review, on the basis that the resolution(s) passed by the Council of the respondent resolving to proceed with a striking application to have the applicant's name removed from the roll of attorneys is, reviewed and set aside, the applicant should succeed in this application before me.

[29] It is first of all important to have regard to the fact that when Lever AJ referred the matters before him to the respondent, he did so on the basis that the respondent must determine and investigate the matter thus referred. He did not make a finding of unprofessional conduct himself. At best, he probably had a prima facie view of unprofessional conduct by the applicant but his referral envisaged a process of determination by the respondent. That process had to be procedurally and administratively fair as contemplated by the Constitution of the Republic of South Africa.

[30] It is common cause that no formal enquiry was held by the respondent, prior to reaching the decision to move for a striking application. It would appear from the papers and more in particular annexure S19 that the Council of the respondent only read the pleadings and affidavits of the cases thus referred to it, before coming to its decision. Something not even Lever AJ did.

[31] As indicated in paragraph [14], *supra*, the respondent specifically referred to the fact that it is acting in terms of rule 50.6.2.2 of the rules governing disciplinary proceedings, referred to in prayer 2.1 of the notice of motion. It follows therefore that the respondent itself, brought this matter into the realm and within the four corners of the said rule 50 as a whole. From a proper reading of rule 50, it is clear that rule 50.6.2.2 is a sub-section of rule 50.6. Rule 50.6 deals specifically with the powers and options of the council of the respondent "*upon receipt of a complaint".* I have grave doubts whether the referrals by Lever AJ constitutes "complaints" in the true sense of the word. Even if it does, rule 50.6.2.2 empowers the Council of the respondent to call upon a member to appear before the Council to "explain or elucidate or discuss the matter". The options available to the respondent's council in rule 50.6.2.1 and 50.6.2.2 are clearly procedural steps affording the member an opportunity to put his version before the council *before* a decision is taken.

[32] It must be remembered that the first resolution of 19 May 2017, which had to date not been rescinded by a court of law, embodied a decision already taken that an application will be made to have the applicant's name struck of the roll of attorneys. The second and third resolutions also, as a point of departure, has the decision that had already been taken, to have the applicant's name struck of the roll, baring explanation from the applicant. This must of course be seen within the context of the Full Bench decision in **Natal Incorporated Law Society v De Beer,** 1950 (2) SA 531 (N) at 535 where the following dicta appears:

"The ordinary principles of our law require that a precise charge sheet should be framed and notified and that the respondent be given an opportunity of meeting the charge and of defending himself at a trial. …. That was not done here, Respondent never had an opportunity of defending himself on a charge of theft or misappropriation. He was merely required to attend an enquiry at which the committee proposed to enquire into his conduct in relation to five cheques drawn by him on the estate account….. It is clear that, even if there had been a conviction by a competent court of law on a criminal offence, this Court would not act on the conviction without affording respondent an opportunity of canvassing the whole matter…"

[33] Nicholas J found in **Meyer v Law Society Transvaal,** 1978 (2) SA 209 (T) at 218 E-G as follows:

"….. as the elected representatives of the attorneys, Council members are required to investigate the conduct of their professional brethren, in the interests of the profession and the general public. Their decision may affect the whole career of the person whose conduct is in question, whether or not the Court makes an order against him. Whatever the Court may decide, proceedings against a fellow attorney may leave a stain against his name in the eyes of the public."

[34] There may well be instances where the council of the respondent may approach the Court to have the name of a member struck of the roll without a formal enquiry preceding the application to Court.

[35] To my mind, this case before me is not one of those instances. The decisions referred to in paragraphs [32] and [33], *supra*, both predates the Constitution of the Republic of South Africa. Besides the fact that they do, the **De Beer-**case acknowledges the need for the formulation of proper charges, a trial and the opportunity of such an attorney to defend himself at such a trial. Despite the

applicant's request for same *in casu*, he was denied such a trial. In the **Meyer-**case, the far reaching consequences of the mere decision such as the one *in casu*, is emphasized.

[36] Section 33 of the Constitution of the Republic of South Africa clearly enshrines the right of everyone to administrative action which is lawful, reasonable and procedurally fair. The above mentioned decisions and the Attorneys Act, Act 53 of 1979, must be viewed in that context.

[37] If this is properly done, the argument raised on behalf of the respondent that the applicant will get the chance to put his version before Court when the application for the striking of his name from the roll of attorneys is brought, is fatally flawed. In the circumstances and on the factual basis I have already alluded to above, the applicant should have had that opportunity to state his case before the decision was made to strike his name from the roll. The only sensible way to have done that, was to hold a formal enquiry as envisaged by rule 50. The applicant's fundamental right to be heard before the decision was made, was thus denied and it can thus in the circumstances not be said that the administrative action of the respondent was lawful, reasonable and administratively fair. To my mind, the applicant thus has a reasonable chance of succeeding with the review application. That being so, I conclude that the applicant satisfied the first requisite of an interim interdict, to wit, a prima facie right.

VI A WELL GROUNDED APPREHENSION OF IRREPARABLE HARM and BALANCE OF CONVENIENCE

[38] On my finding that in the particular circumstances of this matter a formal enquiry should have been held where the applicant had to be afforded the opportunity to state his case, prior to the decision being made, which was not done; It is clear that the applicant will suffer irreparable harm and that the balance of convenience favours the granting of the interim interdict. In the premises, the applicant also satisfied these two requisites of an interim interdict.

VII NO OTHER SATISFACTORY REMEDY

[39] In view of the factual basis set out in paragraphs [16], [17] and [18], *supra*, the applicant had no other satisfactory remedy but to approach this Court for this relief.

VIII COSTS

[40] The applicant moves for an order of costs against the Respondent on an attorney and client scale. There is no reason why the award of costs should not follow the result, but I can see no reason for a punitive order of costs.

IX ORDER

[41] In the premises I make the following order:

1. **The respondent is interdicted and restrained from proceeding with the proceedings against the applicant in terms of the notifications by the respondent contained in annexure "S10" at page 84, annexure "S10.1" at page 85, annexure "S11" at page 86, annexure "S15" at pages 89 to 96, annexure "S17" at page 99, annexure "T2" at page 107 and annexure "T3" at page 108 of the paginated papers, pending finalization of the application launched by the applicant in this Court under case number 1953/2018.**

2. **The respondent is ordered to pay the costs of this application, which costs will include the costs of two counsel, where employed.**

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L. POHL, AJ

On behalf of applicant:	Adv. L Halgryn SC Adv. C Snyman
Instructed by:	Eugene Attorneys Bloemfontein
On behalf of respondent:	NW Phalatsi
Instructed by:	NW Phalatsi & Partners Bloemfontein