IN THE NORTH GAUTENG HIGH COURT, PRETORIA

17/12/2010
NOT REPORTABLE

CASE NO: 34800/2009

In the matter between:

THE PRETORIA SOCIETY OF ADVOCATES **APPLICANT**

and

CRAIG GRANT CROSS **RESPONDENT**

JUDGMENT

LOUW J

Introduction

[1] The applicant is the Pretoria Society of Advocates, a voluntary association duly constituted as such according to its constitution. The respondent is a major male advocate. He was admitted as an advocate in the Cape of Good Hope Provincial Division on 11 February 2000. His full career details will be set out hereunder.

[2] The applicant applies that the name of the respondent be struck from the roll of advocates alternatively that he be suspended in his practice as an advocate for such period as the court may deem fit.

[3] The immediate cause of this application is that the applicant, having previously successfully completed pupilage at the Cape Bar, during about the beginning of February 2009 applied for full ordinary membership of the Pretoria Bar (the applicant). From his application it appeared that he was in the employment of Mothle, Jooma, Sabdia Inc (MJS), a firm of attorneys in Pretoria, as a consultant in the MVA

department. He however stated in his application form, in response to a question whether he had previously been removed from the roll of advocates, that he had not.

[4] Instead of admitting him as a member, the applicant investigated the matter. The respondent was interviewed on various occasions by members of the applicant. On 11 February 2009 a member of the applicant, Scholtz, laid a formal complaint against the respondent. During the course of the investigation information was also obtained from three other members of the applicant, namely Botha, Ridgard and Diederichs. On 29 May 2009 the Bar Council of the applicant decided to launch the present application. The aforementioned four advocates also made affidavits in support of the applicant's application.

[5] The essence of the case against the respondent as it crystallised in argument before us is the following:

5.1. That he remained on the roll of advocates whilst employed by MJS attorneys.

5.2. That he held himself out to be an attorney.

5.3. That his name appeared on the letterhead of MJS as a professional assistant.

[6] A chronology of the applicant's career is as follows:

- 1997 – Respondent achieves LL.B. degree.
- 1998-2000 – Respondent a candidate-attorney at McCallum's Inc.
- 11 February 2000 – Respondent admitted as an advocate in the Cape of Good Hope Provincial Division.
- 21 August 2000 – Respondent admitted as a member of the Cape Bar Association.
- 30 November 2001 – Respondent resigns as a member from the Cape Bar Association.

- December 2001-July 2002 – Respondent a legal advisor at Alexander Forbes.
- August 2002-Septemper 2006 – Respondent a claims handler at the Road Accident Fund (RAF).
- October 2006-approximately March 2009 – Respondent in the employ of MJS Inc. Attorneys.
- 24 November 2008 – A certificate of good standing issued by the Cape Bar Association to the Respondent.
- February 2009 – Respondent applies to be admitted as a member of the Applicant.

The Law

[7] It is well-established that an application for the suspension or removal from the roll requires a three-stage enquiry. This applies to both attorneys and advocates. In relation to attorneys the position was recently reiterated by Harms DP in *Law Society, Northern Provinces v Mogami*, 2010 (1) SA 186 (SCA):

> "*First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual inquiry. Second, it must consider whether the person concerned is 'in the discretion of the court' not a fit and proper person to continue to practise. This involves a weighing-up of the conduct complained of against the conduct expected of an attorney and, to this extent, is a value judgment. And third, the court must enquire whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice (Jasat v Natal Law Society 2000 (3) SA 44 (SCA) ([2000] 2 All SA 310); Malan and Another v Law Society, Northern Provinces 2009 (1) SA 216 (SCA) ([2009] 1 All SA 133; [2008] ZASCA 90) at para 10).* " (paragraph 4 of the report)

[8] In an application such as this, the court in terms of s 7(1)(d) of the Admission of Advocates Act, 74 of 1964, may grant the application if the court is satisfied that the respondent is not a fit and proper person to continue to practice as an advocate.

[9] The prohibition against dual practice, that is an advocate doing attorneys' work, is clear. All the constituent Bars of the General Council of the Bar of South Africa ascribe to the rule that, with minor exceptions, advocates do not accept instructions from clients without the intervention of attorneys. The highest courts of the land have held that the rule exists and must be adhered to by all advocates (*Beyers v Pretoria BalieRaad*, 1966 (2) SA 593 (A); *General Council of the Bar of South Africa v Van der Spuy*, 1999 (1) SA 577 (TPD); *Society of Advocates of Natal v De Freitas and Another (Natal Law Society Intervening)* 1997 (4) SA 1134 (N)*; De Freitas and Another v Society of Advocates of Natal and Another*, 2001 (3) SA 750 (SCA)).

The first enquiry: the offending conduct

[10] The first issue outlined above, namely that he remained on the roll of advocates whilst working for MJS, is not in dispute. His explanation in that regard, both in his explanation to the applicant as well as in his answering affidavit is that he thought that when he resigned from the Cape Bar, his name was also removed from the roll of advocates. He puts it as follows in his answering affidavit:

> *"7.2 When I resigned from the Cape Bar, I was under the* bona fide *belief that as a matter of course the administrative procedure for resigning would automatically result in me ceasing to be considered an advocate. I was furthermore under the belief that the Cape Bar would automatically and simultaneously remove my name from the roll of advocates. I acted in good faith at all times, without realising that my name had not been removed from the roll of advocates."*

[11] In the replying affidavit this is described by the applicant as "an unbelievable conviction" which the respondent does not motivate. It is indeed difficult to believe. As an advocate the respondent must have known that the procedure to be admitted as an advocate and that of becoming a member of a Bar are totally separate procedures. Why his resignation from the Cape Bar would, according to his understanding, have lead to his removal from the roll of advocates is difficult to understand. On a benevolent reading of the papers it seems rather to have been a matter which escaped his mind. During the period of 5 years following upon his resignation from the Cape Bar, when he was employed by Alexander Forbes and by the RAF, it was no issue that he was still on the roll of advocates. When he joined MJS it was not with the object of qualifying himself as an attorney – he worked as a consultant in the MVA department of the firm.

[12] Advocate Botha, who knew the respondent, as Botha was sometimes briefed by MJS in matters in which the respondent was involved, has a different recollection about this matter. He states that when he had a discussion with the respondent about the possibility of the respondent joining the Bar, Botha told him that he needed to apply for his readmission as advocate. Thereupon the respondent told him that he could not remember if he ever had himself removed from the roll. Further, according to Botha's recollection, respondent stated that it was such an effort ("dit so 'n storie is") to have one's name removed from the roll. The two versions, on the one hand, not remembering and, on the other hand, regarding it as an effort, do not match.

[13] I am however not prepared to, on these papers alone, reject the respondent's version as false and dishonest. However it is clear that the respondent was grossly negligent. He was quite casual as to whether he was on the roll of advocates or not. In this regard he failed to display the diligence, thoroughness and attention to detail which is expected from members of this honourable profession. He did not pay regard to the well-established principles of the separation of the

professions as set out above.

[14] I therefore find that the respondent acted unprofessionally in remaining on the roll of advocates when employed by MJS.

[15] Secondly, the four advocates mentioned above were under the impression that the respondent was an attorney. It is indeed a serious charge to pretend to be or hold oneself out as an attorney, when you are not. Ridgard and Botha were under that impression as they received briefs with the respondent's reference thereon and he also occasionally accompanied them to court. He however never signed any pleadings and, whenever an affidavit had to be made, said that it had to be made by Mr Mothle or some other director of the firm.

[16] Mr Mothle's affidavit is clear. He says that the respondent was employed as a consultant in the Road Accident Fund department, of which he is in charge. It is clearly a big department as, apart from Cross, eleven professional assistants also worked in that department. The references on a file are internal administrative references, setting out which person is "carrying" the file. It is thus not to be deducted from the fact that the respondent's name appeared on correspondence or on briefs, that he pretended to be an attorney. Mothle makes the statement that respondent never accepted instructions from the public, never had any dealings with the public at large, never had a pecuniary interest in the firm and never acted as an attorney.

[17] The affidavits of Scholtz and Diederichs do not take the matter any further as they both made the assumption that the respondent was an attorney. These assumptions were not justified.

[18] In argument Mr Pelser SC agreed that there was no evidence that the respondent ever expressly held himself out to be an attorney.

[19] The third aspect, namely that his name did on occasions appear on the

letterhead of MJS, is closely connected to the previous aspect. The respondent's explanation is that it was a mistake made by the office manager and/or the fact that some secretaries used different letterheads. The office manager Hannelie Engelbrecht erroneously instructed the letterhead to be changed so has to incorporate the respondent's name as that of a professional assistant. There is a supporting affidavit by Hannelie Engelbrecht that she made a mistake.

[20] Although it is disturbing that his name appeared on letterheads dated 20 February, 5 May and 23 October 2008, it cannot be accepted that the respondent played any part in this. Instead, we have found above, that the respondent did not hold himself out to be an attorney and therefore it must follow that he had no motive to have himself represented as such on a letterhead. Only one of the three letters referred to bears the respondent's reference. This letter is the October letter and forms part of a brief sent by the respondent to Botha.

[21] The respondent states that the firm at that stage had a substantial turnover of personnel and that various letterheads were used.

[22] Once again the respondent should have been much more careful. He should never have allowed a letter from the firm to indicate him as a professional assistant. The term "professional assistant" is universally understood in the attorneys' profession to mean that, that person is a qualified attorney. This is also appreciated by the respondent and by Mr Mothle who refers to the respondent as a consultant.

[23] To summarise: the respondent acted unprofessionally in practising at an attorneys' firm whilst on the roll of advocates. Secondly, at least in one instance, he sent correspondence on a letterhead which indicated him to be a professional assistant. However we do not find that the respondent expressly held himself out to be an attorney.

The second enquiry: is the respondent fit and proper to continue practising?

[24] I have concluded that the respondent is not unfit to continue practising. The conduct outlined in the aforegoing paragraph shows gross negligence in regard to his removal from the roll and, at least, inattention in not noticing the mistake on the letterhead.

[25] However, the concession was rightly made in argument that the respondent did not bring the profession in disrepute. Neither did anyone suffer prejudice as result of the respondent's omissions.

[26] In argument the applicant also did not contend that the respondent was not fit and proper to practice and that the appropriate sanction would be striking from the roll.

The sanction

[27] An appropriate sanction would have been a suspension for a period of approximately of three months. In the cases of *De Freitas* and *Van der Spuy* referred to above periods of suspension of six months were imposed. In my view the contraventions in this case are not as serious as in those cases.

[28] Unfortunately the respondent has already been effectively been suspended for more that nineteen months. He resigned from MJS with effect 30 April 2009 and has been unemployed since. This lamentable state of affairs is primarily due to the unacceptable clogging of the roll in having appeal cases and matters of this nature set down. I notice from a previous notice of set down that this matter was actually set down for hearing on 27 May 2011, but has been moved forward because of drastic steps taken recently to remedy the situation. In this case the Deputy Judge President should have been approached to have the matter set down much earlier and on an expedited basis. A

trial date was applied for as long ago as September 2009.

[29] In the circumstances it would be futile to impose any further period of suspension (*Mogami supra* paragraph 28).

[30] The respondent still desires to join the applicant. Financially he has suffered grossly as result of these events. He has two small children, his wife was the only breadwinner and the papers show that they also had, or was about to, sell their home because they could no longer afford to pay the bond.

[31] The respondent has to be reprimanded. I express the hope that he has learnt from his mistakes and that he will in his future practice at the Bar conform to the highest standards of ethics, duty and diligence expected of an advocate. An advocate who has the tradition of the Bar behind him will in regard to right or wrong "as a rule not even be called upon to make any conscious decision on the subject. He will know instinctively whether on action is permissible." (Judge RPB Davis in the foreword to the first edition of *The Civil Practice of the Superior Courts in South Africa*).

Costs

[32] In this regard respondent's counsel argued that the founding affidavit did not expressly state that respondent was not a fit and proper person and at the hearing applicant conceded that and furthermore that striking off was not called for. The respondent was thus for a period of nineteen months deprived of the opportunity to work in the legal profession. There is some merit in this argument. However it is implied in the applicant's papers that respondent is not fit and proper. Surely the applicant knows that an order for striking off can only follow on such a finding. The detailed memorandum by SJ Maritz SC and F du Toit SC, which supports this application, states in paragraph 11.9 thereof that the respondent is not a fit and proper person to remain on

advocates. It should be remembered that allegations of dishonesty in regard to the respondent's explanations of his conduct were made. The applicant was obliged to put the available evidence before Court. If it were not for these allegations the Bar Council could well have dealt with the matter internally.

[33] The respondent has however already suffered unduly as a result of the delay in having the matter finalised. He is also about to embark on a career at the Bar. It is notorious that it is difficult to establish oneself in practice and our costs order should not have the effect of thwarting that ambition.

[34] In all the circumstances each party should pay its/his own costs. However the applicant should not be left out of pocket in terms of the attorneys' costs it had incurred.

[35] It is therefore ordered as follows:

1. The respondent is reprimanded for his unprofessional conduct.
2. The respondent has to pay the applicant's attorney's costs.

AA LOUW
JUDGE OF THE HIGH COURT

I agree

NJ KOLLAPEN
ACTING JUDGE OF THE HIGH COURT