REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT, PRETORIA 12/02/2010

77720/09

CASE NO: 32233/2008

(DELETE WHICHEVER IS NOT APPLICABLE)
((1)) REPORTABLE: YES/NO.
((2)) OF INTEREST TO OTHER JUDGES: YES/NO.
((3)) REVISED.
09-02-2010
DATE SIGNATURE

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES
(Incorporated as the Law Society of the Transvaal) Applicant

and

PETER ARTHUR DYKES First Respondent

CHERYL RAMSAMY Second Respondent

PHASUDI DOCTOR SEGOGOBA Third Respondent

JOHAN VAN HEERDEN Fourth Respondent

DYKES VAN HEERDEN INC Fifth Respondent

JUDGMENT

VICTOR, J:

INTRODUCTION

[1] On 14 July 2008 the applicant launched an application for the striking off of the respondents from the roll of attorneys as defined in the Attorney's Act No 53 of 1979 (the Act).

[2] The application before court today relates solely to the condonation application by the respondents for the late filing of the answering affidavits and the costs thereof. The applicant opposes the late filing and seeks an order for costs.

RELEVANT BACKGROUND FACTS

[3] Some 6 months after the launch of the application, the applicant in December 2008 filed a further supplementary affidavit. This made the papers voluminous. Well after the launch of the application, the applicant attended to a full forensic investigation into the respondents' affairs and the report of Mr Swart was only forthcoming in February 2009.

[4] Throughout, the respondents attempted to meet with the applicant to try and resolve matters to no avail. They were only advised on 23 December 2008 on a formal basis that the applicant was not prepared to meet with them. The applicant did not hold a full enquiry thereby giving the respondents an opportunity to explain their case. The respondents justifiably felt aggrieved by this refusal.

[5] Finally the then President of the Law Society, Mr Mnisi, was prepared to meet with them and this meeting took place on 16 January 2009. He allowed the respondents to make written representations which they did on 12 March 2009.

[6] The respondents took the view that there would be no need to file answering affidavits whilst these representations were ongoing. They were represented by Attorneys Webber Wentzel and clearly the decision not to file answering affidavits at that stage was not taken lightly.

[7] On 11 May 2009 the respondents advised the applicant that they would bring an application to stay the striking off proceedings.

[8] By 27 July 2009 the applicant indicated that it was still obtaining instructions as to whether it would be prepared to stay the application for the striking off whilst the matter was being dealt with to the Competition Commission. In August 2008 the respondents referred the subject matter of the applicant's complaint against them to the Competition Commission.

[9] The respondents took advice from Mr Mervin Dorasamay, the Senior Legal Adviser, of the Competition Commission. On 31 July 2009 advised them that in terms of section 65(2) of the Competition Act the High Court was not entitled to consider the matter pending the outcome of the complaint.

[10] By 31 August 2009 the applicant advised that it would not stay the proceedings until the investigation was completed before the Competition Commission.

[11] The respondents still hesitated in filing answering affidavits presumably hoping for resolution by virtue of the intervention of the Competition Commission. On 1 September 2009 the respondents had contact with the Competition Commission to try and expedite matters. It soon became clear that the matter before the Competition Commission would take time.

[12] It is noteworthy that the respondents were represented by attorneys Webber Wentzel and by senior counsel. The decision not to file answering affidavits even at this stage could not have been taken on a frivolous basis. In addition some of the very transgressions which the respondents were charged with were being challenged by the Law Societies of South Africa (LSSA) before the Competition Commission.

[14] What is clear however that by 31 August 2009 the applicant advised the respondents that it was not prepared to place the matter in abeyance and that their affidavits had to be filed.

[13] Despite this demand by the applicant the respondents took the view that notwithstanding the attitude of the applicant towards the Competition Commission investigation, because there were no allegations of theft, fraud and the misappropriation of money, the public interest was not being prejudiced, so they could pin their hopes on an application to the High Court based on section 65(2) of the Competition Act i.e to stay the striking off proceedings.

[14] Various correspondence was exchanged but it was quite clear by 3 September 2009 that the stay application had to be launched pending the outcome of the Commissioner's decision.

[15] The respondents continued to address correspondence to the applicant and on 29 September 2009 again requested a stay of the application proceedings in order to avoid unnecessary costs. On 8 October 2009 the Competition Commission indicated that a letter would be addressed to the Judge President of this court regarding the stay of proceedings.

[16] The applicant continued to refuse that the striking off application be stayed.

[17] The application for a stay of proceedings was launched and enrolled for 3 November 2009. The applicant filed an answering affidavit to the stay application and the respondents replied. At no stage did the respondents file their answering affidavits in the striking off application.

[18] When the matter came before court on 3 November 2009 the court found that the stay application and the striking off application had to be heard together.

[19] A further incident occurred to delay the filing of answering affidavits. On 16 November 2009 the applicant wrote to the respondents' attorney advising that the applicant objected to the fact that Attorneys Webber Wentzel

represented the respondents in this matter. Because of facts not pertinent to the adjudication of this condonation application, the applicant took the decision that representation of the respondents by Attorneys Webber Wentzel created a conflict of interests. No reasons were given. The very next day the respondents requested the reason for this stance. No substantive explanation has yet been given by the applicant.

[20] On 23 November 2009 Webber Wentzel sent a letter to the applicant and took the view that they would continue representing the respondents and also mentioned that the drafting of the answering affidavits would be delayed. Ultimately Webber Wentzel agreed to withdraw as attorneys of record.

[21] Clearly the applicant's stance on Webber Wentzel representing the respondents caused some delay. The respondents expected that their affidavits would be delivered by 27 November 2009.

[22] The respondents took the view that the applicant had contributed to the delay by the last minute objection against Webber Wentzel representing them. This also meant they would not have the benefit of senior counsel to assist in settling their answering affidavits.

[23] In order to prepare the answering affidavits it was necessary to trace a former member of staff. This took time. By 27 November 2009 it was clear that the answering affidavits would not be ready and a letter was sent advising the applicant of this. The respondents stated that the answering affidavits and

condonation application would be served by 30 November 2009. This deadline was not met by the respondents. The documents were filed in the week of the hearing of 3 December 2010

EVALUATION

[24] The question to be determined is whether condonation should be granted for the late filing of the answering affidavits for the striking off application. It is manifest that failure to condone the late filing of the answering affidavits to the striking off application would have dire consequences for the respondents. The material facts relating to the condonation application have been set out in some detail above. In Byron v Duke Inc[1] have been summarised.

> *"the principles governing condonation applications and the factors which weigh with this Court are well-known and have been often restated. The main principles are succinctly formulated in Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie 1969 (3) SA 360 (A) at 362F - H as follows:*
>
> *'(T)he factors usually weighed by the Court include the degree of non-compliance, the explanation therefor, the importance of the case, the prospects of success, the respondent's interest in the finality of his judgment, the*

[1] *2002 (5) SA 483 (SCA)*

convenience of the Court and the avoidance of unnecessary delay in the administration of justice"

[25] The degree of non compliance by the respondents needs to be assessed as from 31 August 2009. It is clear that the respondents were tardy in preparing their answering affidavits. They must have hoped that circumstances would overtake the necessity for filing answering affidavits in the striking off application. The respondents are attorneys and should have reacted to the applicant's refusal to grant further indulgences for the filing of answering affidavits.

[26] On the other hand the respondents were confident that the referral to the Competition Commission would indeed result in their vindication. The support of the issues before the Competition Commission was widespread throughout the legal profession. It is not as if the respondents were on a frolic of their own and referred the matter for the purpose of delay.

[27] The respondents were also represented by very senior practitioners in the attorney's profession. The respondents did not sit back and do nothing. They had a meeting with the Senior Legal Adviser of the Competition Commission and also had subsequent meetings. The respondents took steps to commence drafting the stay application and finally served and filed same when it became clear to them that they had no alternative.

[28] The issues are of great importance to the respondents. Some of the respondents are young practitioners who did not introduce the practices complained of. The respondents took active steps to progress their defence in the matter. This of itself is an important factor to grant condonation.

[29] A confounding factor was introduced by the applicant at a late stage. The applicant forced the withdrawal of Attorneys Webber Wentzel at a very late stage and this contributed to delay. The matter had already been placed on the roll on 3 November 2009 and it was a mere seven days prior to the hearing of the application that the applicant advised finally that it would not allow Webber Wentzel to represent the respondents. This is manifestly unfair. The respondents are entitled to a fair legal process and this is a further ground for the granting of the condonation.

[30] I am satisfied that the application for condonation should be granted.

COSTS OF CONDONATION

[31] The question of costs requires analysis. Mr Labuschagne SC on behalf of the applicant submitted that these respondents had since 31 August 2009 failed to file their answering affidavits. As officers of the court they should have known better. It did not behove them to simply sit back and rely on section 65(2) of the Competition Act No 89 of 1998. Furthermore it was not proper to await the outcome of a stay application as a basis upon which not to file answering affidavits in the striking off application. The applicant is a

statutory body which acts in the interests of the public as well as the legal profession. The court ultimately has a duty to facilitate the applicant's role in this important task. This litigation is *sui generis*.

[32] The applicant has a duty to the entire legal profession to ensure that its rules are adhered to. Timeous filing of affidavits answering the allegations justifying the launch of a striking off application is essential for the proper administration of its affairs. Ultimately the respondents are seeking an indulgence and the applicant was entitled to oppose this application and is therefore entitled to costs of the opposed hearing of 3 December 2009.

[33] Once a bill of costs is taxed it is payable immediately. I take into account that the respondents had to incur the additional costs of briefing a new team of legal representatives at very short notice. The respondents will have to bear the costs of several further rounds of litigation to test very important issues for the legal profession as a whole.

[35] In doing justice to the unique set of circumstances as set out above I take the view that the costs must be paid once the litigation has been completed.

The order that I would make is the following:

1. The respondents are granted condonation for the late filing of the answering affidavits in the striking off application.

2. The costs associated with the condonation application as well as the hearing of 3 December 2009 are to be paid by the respondents.

3. The said costs are to be taxed and paid upon the completion of the striking off application including any appeal processes.

M VICTOR
JUDGE OF THE HIGH COURT

I agree and it is so ordered:

SAPIRE AJ
ACTING JUDGE OF THE HIGH COURT