IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)
CASE NO: 36147/2009

In the matter between:

PRETORIA SOCIETY OF ADVOCATES Applicant

And

RALPH PATRICK NDLEVE Respondent

CORAM: DE VOS J; EBERSOHN AJ

DATE HEARD: 26 April 2013
DATE JUDGMENT HANDED DOWN: 12 JUNE 2013
JUDGMENT
EBERSOHN AJ

[1] This is an application in terms of which the Applicant, the Pretoria Society of Advocates, applies for an order that the name of the

Respondent, RALPH PATRICK NDLEVE, be struck from the roll of advocates in terms of section 7(2) of the Admission of Advocates Act, 74 of 1964 ("the Act") and for an order that the Respondent pays the costs of this application on the scale as between attorney and own client as well as that this application be referred to the Director of Public Prosecutions for investigation.

[2] The Respondent was admitted as an advocate of the above Honourable Court on 18 February 2002 under case no: 4747/02.

[3] The Respondent usually practises in the area of jurisdiction of this Honourable Court as an independent advocate and is not a member of any Society of Advocates affiliated to the Applicant

[4] The Applicant is a Society of Advocates established for the North Gauteng High Court, Pretoria as contemplated in Section 7(2) of the Admission of Advocates Act, Act 74 of 1964, and consequently has locus standi to bring this application.

[5] The Applicant has since 2006 received no less than 6 (SIX) complaints against the Respondent.

The Act

[6] This section provides that the court may, upon application, suspend any person from practice as an advocate or order that the name of any person be struck off the roll of advocates "if the Court is satisfied that he is not a fit and proper person to continue to practise as an advocate

[7] The Applicant has the requisite standing to bring this application in terms of the provisions of Section 7(2) of the Admission of Advocates Act, 74 of 1964.

[8] In Law Society v Du Toit 1938 (OPD) 103 approved in Society of Advocates of South Africa (Witwatersrand Division v Cigler) 1976

(4) SA 350 (T) at 357 - 358D the Court held as follows:

"The proceedings are instituted by the Law Society for the definite purpose of maintaining the integrity, dignity and respect, the public must have for officers of this Court. The proceedings are of a purely disciplinary nature, they are not intended to act as punishment of the Respondent. The public are entitled to demand that a Court should see to it that officers of the Court do their work in a manner above suspicion. If they were to overlook the conduct on the part of the officers of the Court, if we were to allow our desire to be merciful to override our sense of duty to the public and have sense of importance attaching to the integrity of the profession, we should soon get into a position where the profession would he prejudiced and brought into discredit

[9] In South Africa there is a divided legal profession. Legal practitioners are either

advocates or attorneys.

See: In re: Rome 1991 (3) SA 291 (A) at 3051-3 06E

De Freitas and Another v Society of Advocates of Natal 2001

(3) SA 750 (SCA), par. [1]

Commissioner, Competition Commission v General Council of the Bar of South Africa

2002 (2) SA 606 (SCA) at 620C-D Rosemann v General Council of the Bar of South

Africa

2004 (1) SA 568 (SCA), par. [28] and [47]

[10] Each branch of the profession has its professional bodies which determine the rules by which their members must conduct their practices, take action to ensure that the members adhere to the rules, scrutinize and where appropriate, take action in regard to applications

for membership of the profession and generally seek to the interests of the member of the profession.

See: In re: Rome 1991 (3) SA 291 (A) at 306A-B;

Society of Advocates of South Africa (WLD) v Van den Heever [2006] JOL 18030 (T)

[11] In In re: Rome 1991 (3) SA 291 (A) at 306F-G when outlining the points of distinction between the two branches of the profession as they were in 1991 (and had been for many years) Corbett CJ referred to the long-standing general legislative intention to keep the two branches of the profession and their members distinct from one another. He said:

"The advocate is, broadly speaking, the specialist in forensic skills and in giving expert evidence on legal matters, whereas the attorney has more general skills and is often, in admission, qualified in conveyance and notarial practice. The attorney has direct links (often of a permanent and long-standing nature), with the lay client seeking legal assistance or advice and, where necessary or expedient, the attorney briefs an advocate on behalf of his client. The advocate has no direct links or longstanding relationship with the lay client: he only acts for the client on brief in a particular matter and is normally precluded by the bar rules from accepting professional work direct from the client. The attorney is responsible to the advocate for the payment of professional fees due to the latter by the client and for recovery of these and his own fees and disbursements from the client: The advocate has no direct financial dealings with the client

[12] In Society of Advocates of Natal v De Freitas & Another 1997 (4) SA 1134 (N) the Society of Advocates sought an order striking off the name of the Respondent, De Freitas, because he accepted instructions directly from members of the public and represented clients in litigation, without having been instructed by an attorney. In opposing the application, De Freitas, was joined by IAASA which brought a counter application for a declaratory order that an "Advocate has, alternatively, advocates who are members of IAASA have, the right to accept instructions from any person with or without the intervention of an attorney.'" This counter application was based on the contention that there is no rule of law or practice to prevent an advocate from accepting instructions or briefs directly from members of the public without the intervention of an attorney. After an exhaustive examination of the legal position, Thirion, J, on behalf of the Full Court, concluded that it is a rule of practice applicable to all practising advocates that they do not accept instructions except from attorneys and accordingly that disobedience of the rules is calculated to lead to irregularities and abuses and consequently, in the interest of the profession and the public, such disobedience should be treated as unprofessional conduct which justifies the exercise of the court of its disciplinary powers (at 117G-H). On appeal to the Supreme Court of Appeal, the findings and the conclusion of the Full Court were upheld.

See: De Freitas and Another v Society of Advocates of Natal and Another 2001 (3) SA 750 (SCA), par. [17] and [18]

[13] It is unprofessional for an advocate to negotiate and receive fees from a client without the intervention of an attorney. In De Freitas, Cameron, JA considered that there was a real and substantial danger to the public if advocates were permitted to handle public money, whether by dealing with their clients' money or even by taking deposits on fees in advance and that soliciting such a payment would be unprofessional and improper conduct which could lead to sanction by the Court.

[3 4] The result is that South African Law recognises a provided profession with a referral system. It is part of that system that the attorney initiates the contract between an advocate and his client and negotiates and receives fees from the client on his own behalf and that of the advocate and the advocate does not handle the money or cheques of his client.

See: Commissioner$_y$ Competition Commissioner v General Council of the Bar of South Africa 2002 (6) SA 606 (SCA), par. [19]

Rosemann v General Council of the Bar of South Africa

2004 (1) SA 568 (SCA), par. [28]

Society of Advocates of SA (WLD) v Van den Heever [2006] JOL 18030 (T)

[15] In Society of Advocates of Natal v De Freitas and Another 1997 (4) SA 1134 (N) the Court held as follows:

""The fact that advocates were included in the definition of “practitioners” in the Magistrates' Court Act 32 of 1944 and the definition of 'plaintiff, 'defendant‘applicant 'respondent’ and 'parties’ in Rule 2(1) of the rules of the Magistrates' Courts did not lead to an inference that the frames of the Act and the Rides intended that an advocate be entitled to do work which was essentially that of an attorney. There were several provisions in the Act which referred to the distinction between the work of attorneys and the advocates: The whole tenor of the Act and the Rules demonstrated that procedural matters were to be dealt with by attorneys and. that the work of counsel was restricted to drafting of pleadings and applications and to appearances in Court. The Court also held that it was legislation (i.e. the Attorneys Act) and not the advocates' profession (through the code of the Society of Advocates), which limited the legal services, which an advocate would provide to clients in the Magistrate's Court. The Court held furthermore, that disobedience to the Rule in question should be treated as unprofessional conduct which justifies the exercise of the Court of its disciplinary powers

[16] In De Freitas v Society of Advocates of Natal 2001 (3) SA 750 (SCA) at 753C-D the Court held as follows:

UA real and substantial danger to the public would result if advocates were permitted to handle public money, whether by dealing with the client's money or even taking deposits on fees in advance. For so long as the absence of statutory trust fund protection continues, it provides a compelling reason for the Courts to enforce the referral rule in the public

interest

[17] In Rosemann v General Council of the Bar of South Africa [2003] 4 All SA 211 (SCA) at par. [28] the Court held as follows:

"At this point the referral ride and its implications (as to which SEE: De Freitas and Another v Society of Advocates of Natal and Another 2001 (3) SA 750 (SCA) at 756C-760I and 764C-765A and Commissioner, Competition Commission v General Council of the Bar of South Africa and Others 2002

(6) SA 606 (SCA) at 620C becomes significant. An advocate in general takes work only through the instructions of an attorney. The ride is not a pointless formality or an obstacle to

efficient professional practice, nor is it a protected trade practice designed to benefit the advocacy. The rule requires that an attorney initiates the contract between an advocate and his client, negotiates about and receive fees from the client (on his behalf and. that of the advocate), instructs the advocate specifically in relation to each matter affecting the client's interests (other than the way in which the advocate is to carry out his professional duties), oversees each step advised or taken by the advocate, keeps the client informed, is present as far as reasonably possible during interaction between the client and the advocate, may advise the client to take or not to take counsel's advice, administers legal proceedings and controls and directs settlement negotiations in communication with his client. An advocate, by contrast, generally does not take instructions directly from his client, does not report directly or account to the client, does not handle the money (or cheques) of his clients or of the opposite party, acts only in terms of instructions given to him by the attorney in relation to matters which fall within the accepted skills and practices of his profession and, therefore, does not sign, serve or file documents, notices or pleadings on behalf of his client or receive such from the opposing party or his legal representative unless there is a Rule of Court or established r ule of practice to that effect, (which is the case with certain High Court pleadings but finds no equivalent in Magistrates' Court practice)"

See: General Council of the Bar of South Africa v Rosemann
2002 (1) SA 235 (CPD) at 235, 236A-B & 245B-D

[18J In paragraph [29] in Rosemann v General Council of the Bar of South Africa [2003] 4 All SA 211 (SCA) the Court held as follows:

"// follows from the preceding overview that an instruction by the attorney to represent the client is not a proper instruction if

(a) It is not specific in identifying the work to be carried out by the advocate;

(h) It confers on the advocate a general discretion to litigate on behalf of his client;

(c) it expressly or impliedly authorises the advocate to by-pass the attorney or to run litigation without the particular participation of the attorney which I have described;

(d) it purports to authorise counsel to cany out any function which is not the proper function of an advocate or is properly the function of an attorney in the sense that it would normally be carried, out only by an attorney or in or from his office

[19] In paragraph [34] in Rosemann v General Council of the Bar of South Africa [2003] 4 All SA 211 (SCA) the Court held further as follows:

‘"The attorney's incapacity is not the concern of the advocate and cannot, by implication, broaden the advocate's mandate to authorise the carrying out of work which falls outside his or her profession competence. ”

[20] In Rosemann v General Council of the Bar of South Africa [2003] 4 All SA 211 (SCA) the Court held as follows:

There is also no merit in the finding that the referral rule is contrary to the provisions of Section 22 of the Constitution of the Republic of South Africa. In terms of Section 22 of the

Constitution citizens have the right to choose their professions freely. There has been no interference with the Respondent's freedom to choose his profession. He chose to be an advocate not an attorney. Section 22 of the Constitution provides, further that the practice of a profession may be regulated by law:"

[21] In Society of Advocates of Natal v De Freitas and Another [1997] 4 All SA 452 (N) at 482 the Court held as follows:

"The legislature has enacted in Section 25, 26, 41, 78 and 79 of the Attorneys Act, 53 of 1997, importing provisions for the protection of a client against theft by the attorney, of money held by the attorney on behalf of his client. In essence these provisions make it obligatory for the attorney to keep a trust bank account in which to deposit all monies, held by the attorney on behalf of anyone, and to keep proper books of account which may be inspected by the council of the Law Society, in respect of money held, received or paid by him on behalf of any person. These sections also provide for the establishment of a fidelity fund from which a person may be compensated for loss suffered as a result of the theft oj trust money by the attorney. Section 78(7) provides that monies

standing to the creditor of the attorney's trust account shall not be regarded as forming part of the assets of the attorney and may not be attached on behalf of a creditor of the attorney. The provisions of Section 78(7) are most important in that they alter the common law consequences relating to the ownership of money paid to an attorney for the purpose of being held by the attorney on behalf of any person.

There is no corresponding statutory provision for safeguarding money held by an advocate on behalf of his client, for the keeping by the advocate of books of account in respect of money held by him on behalf of the client, or a separate trust bank account in which to keep money held by him on behalf of the client. The reason for the omission by the legislature to make any statutory provision in this respect for safeguarding the position of the client vis-a-vis the advocate was obvious as was already pointed out above"

[22] The Respondent is not a member of the Applicant. The only remedy available to the Applicant is that given in terms of the provisions of Section 7(2) of the Admission of Advocates Act, 74 of 1964.

[23] The principal dispute of fact is whether the Respondent took work directly from the public (lay clients) without the intervention of an attorney and whether such conduct constitutes professional misconduct for which the Respondent's name may be struck from the roll of advocates.

[24] It is furthermore, the case of the Applicant that the Respondent received money directly from a lay client without the intervention of an attorney and that such conduct constitutes professional misconduct.

[25] There are also serious allegations of theft, alternatively fraud against the Respondent.

[26] It was submitted on behalf of the applicant that the Respondent is not a fit and proper person to practise as an advocate.

[27] It is significant that six different complainants, independently of one another, complained of the same misconduct by the Respondent. Although the facts of each case differ, they are remarkably similar with regard to the modus operandi employed by the Respondent. Ail the complainants submitted complaints in writing about the Respondent and these were amplified in the Applicant's Founding Affidavit.

[28] In the complaint by POPIE MPUTSIYE NONYANE the complaints are as follows:

a) the contravention of the common law principle that an advocate is not allowed to take instructions directly from a lay client without being properly briefed by a practising attorney;

b) the contravention of the common law principle that an advocate is not allowed to take money from a client otherwise than in respect of reasonable or agreed fees, through the instructing attorney; and

c) the commission of theft of an amount of R 148 000.00, alternatively fraud on Mrs

NONYANE.

d) The facts underlying the aforesaid allegations appear from Annexure "PE3", attached to the Applicant's Founding Affidavit on paginated pages 22-25.

"Attached hereto is a copy of a complaint received regarding your conduct as an advocate.
You are invited to respond thereto within 21 days of date of this letter. In your response you are required also to deal with the following question:

1. When and where were you admitted as an advocate? (A copy of your brief is required.)

2. Who was the attorney instructing you to deal with the matter? (A copy of your brief is required).

3. Did you receive the monies referred to in the letter of Ms Nonyane?
4. Did you settle the debt to Toyota?

5. What were the purpose of your visits to Durban, Rustenburg and Johannesburg?

Should you fail to respond hereto, an application may be launched against you to strike your name from the roll of advocates.

Kindly treat this request with the requisite professional seriousness

a) Upon receipt of the aforesaid complaint on 1 August 2008 the Applicant wrote a letter to the Respondent in which the Applicant asked eight direct questions to the Respondent, which he has chosen not to answer.

f) The respondent made a statement which reads as follows:

"Sworn Declaration

I , the undersigned

RALPH PA TRICK NDLEVE

73……..

Do hereby declare under oath as follows:

I am the deponent herein and the facts hereto deposed being within my personal knowledge and are to the best of my belief both true and correct.

I confirm that I am the appointed agent in the above estate to assist the executrix, Mrs. M P Nonyane in her administration of her late husband estate as well as any legal issues for her and her immediate family members.

I further confirm that I was further entrusted with settling the issue of the Toyota Bakkie, which is being financed by Toyota Financial services. I further confirm that we are still pursuing the case against the Insurers (Hollard Insurance).

I further confirm that I was also entrusted with money, which was not handed to the said Toyota Financial service and it is on this basis that I sincerely apologise to the family of Nonyane for the dishonesty.

I hereby confirm that I was not justified in doing as I did. I hereby undertake to pay back the amount of R1 00 00.00 (one hundred thousand rand) to the family irrespective of the amount outstanding to the Bank.

I hereby hand over a post-dated cheque of R100 000.00 to be honoured by the bank on 30 June 2005 in favour of Mrs. M P Nonyane.

I confirm that should the cheque he dishonoured for any reason whatsoever the family is entitled lay a charge of fraud and/or alternatively theft.

I humbly ask for the family's forgiveness. ”

g) In paragraph 8.2 of the Respondent’s Answering Affidavit on paginated page 156 the Respondent admitted that the matter is still pending in criminal proceedings against him where he is charged with fraud and/or alternatively theft.

h) From the aforementioned letter (Annexure “PE6”) it appears that a criminal

investigation was commenced against the Respondent arising from the aforesaid allegations by Mrs NONYANE, which were:

(i) Proof of payment of R 100 000.00 into the Respondent's account.

(ii) From Annexure "PE6.1" the bank statement of the respondent it is clear that on 28 September 2004 Mrs M P NONYANE deposited an amount of

R100 000.00 into the cheque account of the Respondent.

(iv) A copy of the cheque that Mrs M P NONYANE paid into the trust account of the Respondent, is reflected on paginated page 35 of the Applicant's Founding Affidavit.

(v) Annexure "PE6.3" on paginated pages 36 - 39 of the Applicant's Founding Affidavit is a further sworn declaration by the Respondent in which he admitted to theft, yet of a lesser amount of R 65 000.00.

(i) In the light of the above evidence alone the Respondent • should be struck from the roll of advocates and that the matter should be referred to the Director of Public Prosecution for further criminal investigation.

[29] The second complaint is one by SIMON and DINAH MALATJI which relates to the contravention of the common law principle that an advocate is not allowed to take instructions directly from a lay client without being properly briefed by a practising attorney as well as the contravention of the common law principle that an advocate is not allowed to take money from a client otherwise than in respect of reasonable and agreed fees, through the instructing attorney as well as the commission of theft, alternatively fraud on Mr and Mrs MALATJI.

(a) The facts underlying the aforesaid allegations appear from Annexure "PE7" on paginated pages 40 - 58, attached to the Applicant's Founding Affidavit It amounted to the handling of a claim against the Department of Health following the death of

their child.

(b) On 5 August 2008 a copy of the complaint was faxed to the Respondent by the applicant. The accompanying letter read as follows:

"Adv RP Ndleve

POLOKWANE

Dear Sir
In re: COMPLAINT AGAINST YOURSELF: MS D MALATJI

Attached hereto are copies of the complaint received against voarself

Kindly respond thereto, if you so desire, within fourteen (14) days of date Hereof.

Kindly deal, in your reply with the following issues:

1. Did you take instructions from Ms Malatji to institute proceedings against the Department of Health for medical negligence?
2. Who was your instructing attorney?
3. Did you negotiate or conclude an agreement of settlement of the complainant's claim?
4. Did you negotiate or conclude an agreement of settlement of the complainant's claim?
5. If so, what were the terms of the settlement?
6. Did you, on behalf of the complainant receive any monies pursuant to such settlement?
7. If so, what amount did you receive and when?
8. Did you account to the complainant in respect of such monies? If so, a copy of the account and proof of payment of the proceedings are required.

Yours faithfully ,

AD VP, ELLIS SC

(c) The only reply received from the Respondent to the Applicant' above mentioned letter is Annexure "PEI V\ attached to the Applicant's Founding Affidavit, on paginated pages 63 to 69 thereof, which reads as follows:

"COMPLAINT: MS D MALA TJI
I acknowledge receipt of your letter dated 5th August 2008.

Kindly confirm the following with the Complainant before I can deal with your request in full:

1. That the attached letter of authority was duly signed by her?

2. That the affidavit was signed at Steelpoort and not in my office in light of her allegation that she was made to sign documents without understanding them.

3. Her new Attorney of record is now demanding the contents of the file which is the subject of her complaint against me and I need your advice as to what to do.

I await your urgent bat kind response.

Yours faithfully

Adv Ndleve

(d) Attached to the reply of the Respondent were various documents being Annexures "PEI 1.1" to "PEI 1.5" to the record. From the aforesaid correspondence it appears that the Respondent did take instructions directly from the MALATJI's, without the intervention of an attorney, yet does not answer any of the pertinent questions addressed to him in the Applicant's aforementioned letter.

(e) Annexure "PE 11.1 for instance reads as follows:

"LETTER OF AUTHORITY

I , the undersigned

DINAH MALATJIE

ID 65……
Do hereby authorize Adv Ralph Ndleve to have access to all the information in my hospital file notwithstanding the confidentiality which exist between the hospital and myself / clinic, may have in this regard.

I further authorize Adv Ralph Ndleve to act on my behalf in this matter on a pro deo basis due to financial constraints and to proceed with the institution of legal negligent case vis-as-vis the death of my new born / stillborn baby and to see it that the matter is finalized in my best interest.
Dated at steelpoort on this day of September 2005.

D. Malatjie

I. ....

Witness
Adv Ralph Ndleve"
It is signed by both Mrs Malatji and the respondent.
Respondent had misled the complainants about the progress in the "proceedings", or had settled same without accounting to the complainants.

(f) In the light of the above alleged misconduct by the Respondent the Applicant submitted that the Respondent's name should be struck from the roll of advocates.

[30] The complaint by a Mr E S NKUNA was referred to the applicant. The complaint was paraphrased as follows in the founding affidavit filed on behalf of the applicant as follows:

"From the aforesaid documents, the following facts emerged:
The late Mr MJ Ndabezitha passed away some years ago (apparently in

1999);

From the estate the respondent was paid (at least) the following amounts:

14.2.1 28 August 2000: R4 000.00

14.2.2 31 August 2000: RIO 000.00

14.2.3 15 September 2000: R52 857.13

14.2.4 2 October 2000: R10 000.00

14.3 The aforesaid monies were paid to the respondent for the purpose of providing in the financial needs of the minor children of the deceased.

14.4 The respondent did not use the aforesaid monies for that purpose, and probably appropriated the funds for his own purpose.

14.5 The respondent has avoided those for whom the money was destined, did not account to them, and sought to avoid the complaint by stating that it happened before he was admitted as an advocate. "

[31] The respondent was invited to deal pertinently with all the facts appearing from the complaints in his answering affidavit.

[32] The Respondent has avoided those for whom the money was designated, did not account to them and sought to avoid the

complaint by stating that it happened before he was admitted as an advocate.

[33] The applicant submitted that the conduct of the Respondent to this complaint subsequent to his admission, clearly demonstrated that he was not a fit and proper person to practise as an advocate.

[34] In May 2006 the Applicant received a complaint from one GEORGE NKANYANI a convicted prisoner.

[35] From the correspondence it is clear that the Respondent had taken instructions from the complainant, to act on his behalf in applying for a reduction of his sentence or correctional supervision, without being briefed by an attorney.

[36] It is furthermore clear from the abovementioned correspondence that the Respondent had received R 3 000.00 from the complainant and that the complainant had terminated his mandate and that the Respondent kept the R 3 000.00 and did not repay it to the complainant.

[37] It is clear that the Respondent took instructions from a lay client, without the intervention of a practising attorney.

[38] On 14 January 2008 the applicant received a further complaint against the Respondent from one CALVIN MAKGOBA. The facts set out in the complaint clearly proves that the respondent took instructions from a lay client without the intervention of an attorney.

[39] On 14 January 2008 the Applicant received a further complaint against the

Respondent from one CALVIN MAKGOBA.

[40] From the complaint it appears, once again, that the Respondent took instructions from a lay client without the intervention of an attorney.

[41] The applicant submitted that the Respondent was not a fit and proper person to practise as an advocate.

[42] The Respondent filed heads of argument and appeared in person at the hearing before this court.

[43] He conceded when answering questions from this court the theft of the money and the facts of the other complaints.

[44] The applicant after he graduated was admitted as an advocate. He did not do articles nor did he do pupillage.

[45] It is a fact that the various Bar Councils in the countiy can accept about 300 pupils a year. Articles are virtually unobtainable. Every

year more than 1400 graduates receive LLB degrees. It is a well-known fact that the 4 years LLB course does not sufficiently prepare a student to practice independently.

[46] The current situation inevitably lead to the situation the respondent found him in. He must practise to be able to survive but he is not trained enough. This the government and the universities must give attention to.

[47] The following order is made:

1. The application succeeds and the name of Ralph Patrick Ndleve is removed by this court from the roll of advocates.
2. The Respondent must pay the costs of the application on the scale of attorney and client.

P.Z. EBERSOHN

ACTING JUDGE OF THE HIGH COURT I concur

H J. DE VOS

JUDGE OF THE HIGH COURT