IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 33739/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

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DATE SIGNATURE

In the matter between:

THE LAW SOCIETY OF THE
NORTHERN PROVINCES — APPLICANT

And

HERMANUS JOHANNES WESSELS BOTHMA — 1ST RESPONDENT

BOTHMA INCORPORATED — 2ND RESPONDENT

JUDGMENT

Fabricius J,

[1] 22 April 2016, Applicant filed an urgent application for the removal of the First Respondent's name from the Roll of Attorneys, alternatively, for his suspension from practice as an Attorney pending his removal from the said Roll. In the Founding Affidavit, facts relating to numerous complaints that were set out in some detail, some of the most important and disturbing allegations made were the following:

1. He practiced without a Fidelity Fund certificate in clear contravention of the ***Attorneys Act 53 of 1979***;
2. He failed to properly account for monies received from the Road Accident Fund in respect of claims instituted by him, and the firm on behalf of various clients;
3. He persistently failed to reply to correspondence addressed to him in this regard.

[2] The Law Society also annexed a report by Ms Geringer dated 11 March 2016, which by way of summary indicated that the Respondent had contravened the following provisions of the said ***Attorneys Act*** and the Applicant's Rules:

1. Rule 68.4.2, in that the firm did not ensure that the accounting records were kept at no other place than its main office;
2. Rule 68.6.1, in that trust money was not kept in the firm's trust account;
3. Rule 68.7, in that the Respondents did not within a reasonable time after the performance of its mandate account to clients in writing;
4. Rule 68.8, read together with Rule 68.7, in that the Respondents did not account to, and pay clients within a reasonable time;
5. Rule 69.5.1, in that the Respondents did not ensure that withdrawals made from the firm's trust banking account were made only to or for or on behalf of a trust creditor;
6. Rule 89, in that the First Respondent's conduct was unprofessional and/or dishonourable and/or unworthy;

7. Rule 89.1, in that First Respondent touted for work of a professional nature;

8. Rule 89.15, in that the First Respondent neglected to give proper attention to the affairs of his clients;

9. Rule 89.24, in that the Respondents over-reached clients;

10. Rule 89.25, in that the Respondents failed to comply with an order, requirement or request of the Applicant;

11. Ruling 9 of the Rulings of the Law Society of the Northern Provinces read with Rule 89 in that there was a conflict of interest when the First Respondent allowed his clients to sign powers of Attorney in his favour, and entered into loan agreements with himself in his capacity as trustee of the Brakspruit Boerdery Trust.

[3] It was stated that the Council of the Applicant had carefully considered the facts available to it and had concluded whether each complaint was considered alone, or all the complaints were considered cumulatively, the First

Respondent had made himself guilty of unprofessional or dishonourable or unworthy conduct, and was no longer a fit and proper person to continue to practice as an Attorney of this Court.

[4] On 30 March 2016, the Council therefore resolved that an application be brought to remove the First Respondent's name from the Roll of Attorneys, alternatively that he be suspended from practicing as an Attorney.

[5] On 10 May 2016, First Respondent filed a "Provisional Answering Affidavit". He was the sole member and director of the Second Respondent. He raised a number of points *in limine* and in the context of the complaint that he had practiced without a Fidelity Fund certificate, stated that such certificate had been wrongfully withheld by the Applicant, as a result of which the Law Society could not rely on that issue as disclosing misconduct or an offence. He also alleged that monies "invested" by his clients, after payments from the Road Accident Fund, were not trust monies covered by the Fidelity Fund, and

accordingly the Fidelity Fund was not at risk. Urgency on that basis was therefore also denied. The second point *in limine* was that the ***Attorneys Act 53 of 1979***, provided for domestic remedies in sections 70 and 71, which the Applicant had elected to pursue. Accordingly, the application stood to be dismissed on that ground as well. In respect of all the other allegations contained in some 800 pages, the First Respondent said that he would require at least 30 days to file an Answering Affidavit, and as a result, he requested the Court to postpone the application sine die, and grant him an extension of 30 days in which to prepare and file an Answering Affidavit on the merits.

[6] The Law Society filed a Replying Affidavit on 12 May 2016, and stated that whilst the Respondent's Provisional Answering Affidavit only dealt with the fidelity fund certificate and urgency, a common theme identifiable from the said Geringer report, was that the First Respondent had been using his clients' Road Accident Fund settlements to finance his personal life and "to

advance loans to his farm". It was said that "one is still to come across a more despicable fraudulent arrangement like this perpetrated by a member of this honourable profession. The scheme that the First Respondent was operating was nothing more than fraud disguised by meaningless general powers of Attorney. In essence, the First Respondent, having been an Attorney representing the many complainants herein, made his clients sign power of Attorney to loan him payments he had received from the Road Accident Fund on their behalf. If the First Respondent needed financial assistance to operate his farming business, the question is why he did not approach financial institutions like banks to advance commercial loans to him. The simulated loans that the First Respondent purportedly granted himself were at an interest of 4%. There is not a single financial institution that grants commercial loans at such a paltry interest. It is clear that such were indeed simulated transactions intended to disguise the true nature of the transactions." It was also said that in certain instances First Respondent had even tried to coerce clients into signing powers of Attorney after complaints

[8] On 18 May 2016, the matter was struck from the Urgent Roll due to lack of urgency. The argument before the Court related mainly to the absence of the Fidelity Fund certificate but, it seems to me that sight was lost of the *dictum* of ***Van Dijkhorst J in Prokureursorde Van Transvaal v Kleynhans 1995 (1) SA 839 (T) at 851E to G***, where he stated that the Court had the capacity to arrange its own procedure or process in the context of the question of whether or not a person was fit to practice as an Attorney. In ***Law Society of the Northern Provinces v Soller 2015 JDR 0339 (GP)***, it was held by Bertelsmann J and I de Villiers J at p.8 that the Respondent therein had no right to insist upon a disciplinary enquiry being held prior to steps being taken for his removal from the Roll. In fact, this Court could *mero motu* initiate steps to strike the Respondent's name off the Roll of Attorneys and could do so, albeit notionally, even without reliance on the Law Society's co-operation or indeed even against its wish.

[9] Be that as it may, for present purposes, on 6 June 2016, First Respondent filed an interlocutory application in terms of Rules 8 (1) and 8 (2) of the ***Rules of Procedure*** for a judicial review of administrative action, read with ***Rule 6 (11)*** of the ***Uniform Rules of this Court***. This application was opposed. It was heard on 24 March 2017, and judgment was reserved. On 25 May 2017, judgment was handed down and the interlocutory application was dismissed by Molopa-Sethosa J and Janse van Nieuwenhuizen J, and the Respondent was given leave to file an Answering Affidavit within 30 days from the date of the order.

[10] Reasons for the order were given by Janse van Nieuwenhuizen J and it dealt with the First Respondent's application which had been brought as a review of the Council's decision to institute proceedings for his removal from the Roll of Attorneys in terms of a number of provisions of the ***Promotion of Administrative Justice Act 3 of 2000*** ("***PAJA***"). The Court referred to the dozens of complaints received by the Law Society from erstwhile clients of the

firm and also to their report of Ms Geringer, who investigated the relevant claims received from 2012 to 2016, and had thereafter prepared her extensive report. The Court dealt with provisions of s. 22 (1) (d) of the ***Attorneys Act*** read with s. 71, 72 and 73 thereof. With reference to s. 72, it was said that it prescribed the disciplinary measures the Council of the Law Society could invoke once a practitioner had been found guilty. The striking-off or the suspension of an Attorney from the Roll was not included in these disciplinary powers conferred upon the Council, and this power remained in the sole domain of this Court. Dealing with Mr D. Rossouw SC's argument that the relevant Resolution by the Law Society constituted administrative action within the meaning of s. 1 of ***PAJA***, and his submission that the Law Society first had to exhaust his internal processes accordingly, the Court dealt with the mentioned decision of ***Soller*** *supra*, and that those submissions were in some instances quite novel but, that it was not necessary to consider them *in casu*. Any finding in respect of the applicability of ***PAJ***A in relation to the ***Act***, would under the present circumstances, be academic insomuch as the

complaints and findings contained in the main application, raised serious questions in respect of the Attorney's fitness to continue practicing as an Officer of the Court. The Court was of the view that the main application should be disposed of as soon as possible therefore. The fair hearing that Mr Rossouw SC was concerned about, could take place before this Court inasmuch as the ***Rules of Court*** made ample provision for such a fair hearing by way of the relevant affidavits, and if necessary, referral to oral evidence. Instead of filing the Answering Affidavit as per the mentioned Court order, First Respondent filed a notice of leave to appeal in terms of Rule 49 (1). On 24 April 2018, and whilst awaiting a date for the hearing of the application for leave to appeal, Respondent filed a notice, in the pending application for leave to appeal, advising of their intention to raise a point *in limine* and to augment their grounds of appeal. In this "application", reference was made to the fact that the Rules of the Law Society of the Northern Provinces were repealed *in toto* in ***Government Gazette 39740*** dated 26 February 2016, and replaced by Rules for the Attorneys Profession which came into operation on 1

March 2016. It was said that those Rules prescribed peremptory domestic remedies to be exhausted as a pre-requisite for an application for the striking off of a member from the Roll of Attorneys, or for his suspension from practice. Therefore, the Resolution taken by the Law Society on 30 March 2016, and the launching of the application constituted in undue process which was unconstitutional and inconsistent read with the provisions of ***PAJA*** as well. It was said that if the Court had been apprised of the peremptory provisions of the new Rule 50 referred to, it would not have come to the conclusion that it did.

[11] The Law Society then filed a notice in terms of Rule 30 (1) on the grounds that the First Respondent's said notice constituted an irregular step. On 22 May 2018, the Respondents withdrew the said notice that they had filed on 24 April 2018 but, on the same day filed a new application in terms of Rule 6 (11) read with Rule 42 (1) (c) of the ***Rules of Court***. On 5 June 2018, the Law Society once again filed a notice in terms of Rule (1) on the grounds that

pending the filing of his Answering Affidavit with reference to the decision of ***Du Plessis*** *supra*, and also ***Law Society v B. Perumal case no. 75967/2018***, wherein I held that a Court could deal with applications for the removal of Attorneys from the Roll of Attorneys even if no disciplinary enquiry was held at all, and that the provision of ***PAJA*** did not detract from this power. In the ***Perumal*** decision under case no. 75967/2018, I rejected the Respondent's contention that the Law Society first had to complete its internal disciplinary procedures, before it could approach the Court for relief. I referred to the fact that the Court was the *custos mores* of the Attorneys' profession, and that it could hear and deal with an application for removal even if no disciplinary enquiry was held at all. I was thereafter informed that on 16 July 2019, an application for leave to appeal against my order to the Supreme Court of Appeal was dismissed on the grounds that there were no reasonable prospects of success. During the hearing of the application on 27 August 2019, I was told that the matter had been brought before the President of the

Supreme Court of Appeal in terms of the provisions of s. 17 of the ***Superior Courts Act*** and that a decision was awaited.

[12] As far as the so-called rescission application was concerned, it was argued on behalf the Law Society that Rule 42 (1) (c) did not apply inasmuch as there was no mistake common to the parties at the time of judgment. The promulgation of the New Rules for the Attorneys' Profession changes nothing with regard to the Respondent's transgressions which were of such a serious nature that they required the imposition of sanctions that were beyond the jurisdiction of the Applicant. In terms of the provisions of Rule 42 (1) (c), a Court rescind or vary an "order or judgment granted as a result of a mistake common to the parties". The requirements of this Rule are discussed in some detail in Herbstein and Van Winsen, ***The Civil Practice of the High Courts and The Supreme Court of Appeal of South Africa, 5TH Edition, Volume 1, at p.935***. It is clear that usually a mistake of fact was required and furthermore, there had to be a "causative link" between the mistake and the

granting of the order of judgment. It was said that "these requirements will be satisfied when evidence that becomes available to the parties after judgment shows that the factual material on which the Court's decision was based was, contrary to the parties' assumption, incorrect". The application of this Rule was also the subject matter of the decision in ***Tshivhase Royal Council and Another v Tshivhase 1992 (4) SA 852 (A)***. It was held by Nestadt JA that a Court has a discretion whether or not to grant an application for rescission under this particular Rule. A common mistake would usually be a mistake of fact. Furthermore, there had to be a causative link between such a mistake and the grant of the order or judgment, and such must have been granted as a result of such mistake.

[13] In ***Law Society of the Northern Provinces v P. A. Morobadi [2018] ZASCA 185***, a judgment of 11 December 2018, it was held that it was not peremptory for the Council to have pursued a formal charge before a disciplinary committee if in its opinion, the particular Attorney was no longer considered to

be a fit and proper person to remain in practice as an Attorney. It was said that in general it was correct that the Council could proceed with an application for the striking off of a practitioner, or for his or her suspension from practice, without pursuing a formal charge before a disciplinary committee, if in its opinion, having regard to the nature of the charges, a practitioner is no longer considered to be a fit and proper person. This conclusion is also in line with what was held ***in Law Society of the Northern Provinces v M. R. Tumagole case no. 24662/2016***, a judgment of Basson J in which she held at [14] that the fact that a matter had been referred to a disciplinary committee did not however affect the right of the Law Society to refer a matter to this Court in terms of s. 72 (6) of the ***Attorneys Act*** and to apply for the striking off of an Attorney from the Roll, provided however that the disciplinary committee had not disposed of the matter finally, and had not imposed a sanction. Quite apart from the above, it is in my view clear, both from the provisions of s. 22 (1) (d) of the ***Attorneys Act of 1979***, and the provisions of s. 116 of the ***Legal Practice Act 28 of 2014***, which partially

commenced on 1 November 2018, read with the provisions of s. 44 contained in Chapter 4 that this Court has the power to consider applications for the striking off from the Roll or suspension orders irrespective of whether or not investigative powers have been completed. This is in my opinion so irrespective of which Rules apply, inasmuch as the mentioned statutes clearly provide for such power. In any event, the common law power in this context is in essence to the same effect.

[14] I am in any event not satisfied that the orders of Molopo-Sethosa and Janse van Nieuwenhuizen JJ would have been any different if they had been aware of the fact that new Rules had to be promulgated. The provisions of Rule 42 (1) (c) in the main apply to common errors relating to facts and not to errors relating to law made by litigants and the Court. Were it otherwise, appeals would be superfluous in many cases, and that is certainly not the intention or purpose of Rule 42 (1) (c). In the present instance therefore the causative link required is absent and the rescission application cannot succeed.

[15] The facts before the Law Society and before me, even in the absence of an answer by First Respondent, are of such a nature that it would not be in the interest of justice or the interests of society if the First Respondent continues to practice until the final resolution of the main application. The evidence is in my view sufficient for a finding that the First Respondent should be suspended from practicing as a legal practitioner in the interim. It is clear, even at this stage of the proceedings, that the First Respondent has no sense of shame, has no respect for the administration of justice, has no respect for this Court, and most probably has no self-respect either.

[16] In the premises the following order is made:

1. **Applicant's rescission application of 13 June 2018 is dismissed with costs as between Attorney and client;**
2. **First Respondent is to pay the costs of the withdrawn application of 24 April 2018 on the scale as between Attorney and client;**

3. **First Respondent is suspended from practice as an Attorney in terms of prayers 1.3 to 1.13.6 of the Notice of Motion until the final conclusion of the Law Society's main application.**

JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

I agree

JUDGE MKHAWANE

ACTING JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Case number: 33739/2016

On behalf of the Applicant: Ms S. Magardie

Instructed by: Damons Magardie Richardson Attorneys

Counsel for the 1st & 2nd Respondents: Adv D. Rossouw SC

Instructed by: Gross, Papadopulo & Lombard

Date of Hearing: 27 August 2019

Date of Judgment: 5 September 2019 at 10:00