


REPUBLIC OF SOUTH AFRICA



IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

DELETE WHICH IS NOT APPLICABLE
[1] REPORTABLE: YES / NO
[2] OF INTEREST TO OTHER JUDGES: YES / NO
[3] REVISED
DATE 17/9/15 SIGNATURE 

18/9/15

CASE NO: 67128/2014

In the matter between:

MOTHULOE INCORPORATED ATTORNEYS

Applicant

And

THE LAW SOCIETY OF THE NORTHERN PROVINCES

First Respondent

THE MINISTER OF JUSTICE

Second Respondent

JUDGMENT

J W LOUW, J

[1] The applicant is an incorporated firm of attorneys. It applies in paragraph 2 of its notice of motion for an order that the decision by the council of the first respondent pursuant to which the respondent wrote a letter to the applicant on 2 July 2014 directing it in terms of s 70(1) of the Attorneys Act 53 of 1979 (the Act) to produce for inspection any book, document or record which is in the applicant's possession or control which relates to the applicant's practice, be set aside. The applicant does not apply for the review of the decision, but I shall assume that that was the intention with the relief which was sought.

[2] The letter informed the applicant that the investigation was to enable the respondent's council to decide whether or not a disciplinary enquiry in terms of s 71 of the Act should be held. The letter further informed the applicant that the investigator would explain the scope of the mandate and the procedure to be followed during the initial interview. The applicant, however, refused the inspector appointed by the respondent, Ms Phossina Mapfumo, access to its records and advised her that she was not welcome. On 21 February 2014, the applicant, after an earlier request by the respondent to set up a meeting regarding the inspection of its accounting records, wrote a letter to Ms Mapfumo in which it was *inter alia* alleged that there were two actions in the North West Division of the High Court involving the North West Housing Corporation and the applicant; that the applicant had a claim against the Corporation for millions of Rands; that these matters were *sub judice*; that the

respondent's decision to inspect his accounting records was premature; that its decision was premature, improper and arbitrary; that the respondent assumed that the applicant had stolen the complainant's monies; that the applicant's detractors colluded with the respondent; that the intended inspection was a witch hunt and that it was intended to intimidate and victimize him.

[3] The primary relief sought by the applicant was an order declaring s 70 of the Act to be unconstitutional. That was the reason for the joinder of the second respondent. A day before the hearing of the application, applicant's counsel, Adv. D P J Rossouw SC, filed supplementary heads of argument in which it was indicated that the applicant would not persist in claiming this relief in view of the decision of the Constitutional Court in *Nyathi v MEC for Department of Health, Gautend and Another*¹. As a result, the second respondent no longer had an interest in the matter and his counsel were excused. The applicant was ordered to pay the second respondent's costs. I shall henceforth refer to the first respondent as the respondent.

[4] The applicant's application is opposed by the respondent and it has filed an answering affidavit. The applicant has not filed a replying affidavit. The respondent has further filed a counter application in which it seeks an order against Mr Wycliffe Ernest Thipe Mothuloe, who practices

¹ 2008 (5) SA 94 (CC) para [149]

as a single practitioner under the style of the applicant, directing him and the applicant to make their complete accounting records and other documents specified in the notice of motion in the counter application available to the respondent for inspection. Mr. Mothuloe and the applicant have not filed a notice of their intention to oppose the counter application and have not filed answering papers thereto. It was, however, submitted by Mr Rossouw that the application and the counter application are based on the same factual matrix and that there are therefore two issues: The validity of the decision referred to in paragraph [1] above and the validity of the council's decision of 26 September 2014 to proceed with a counter application.

[5] It appears from the applicant's founding papers that Koikanyang Inc Attorneys (Koikanyang) wrote a letter to Mr Mothuloe on 24 May 2012 in which they advised that they acted on behalf of a number of clients who had signed deeds of sale for the purchase of properties from the North West Housing Corporation, that the clients had paid the required deposits for those properties into the applicant's trust account and that the properties were not transferred to the clients. They accordingly demanded payment of those deposits from the applicant on behalf of the clients, the total of which was R145 780.45. A further letter was written by Koikanyang to Mr. Mothuloe on 5 June 2012 in which they advised that they also acted on behalf of 2 further clients who had paid deposits into the applicant's trust account and that if their payments were added to the

ones mentioned earlier, the total amount claimed on behalf of the clients was R409 604.80. Affidavits by three further clients were attached to the complaint. If their claims are added to the others, the total amount deposited by the clients with the applicant amounted to R530 903.73.

[6] The amount claimed on behalf of their clients by Koikanyang was not paid by the applicant and Koikanyang thereafter laid a complaint with the respondent. The respondent wrote to the applicant on 22 August 2013 and requested a response to the complaint and a copy of the applicant's ledger account or proof that the amount complained about was available in the applicant's trust account.

[7] The applicant responded in a letter dated 13 September 2013 in which the following is said:

- "2. *We must at the outset make it abundantly clear that firstly the funds of the North West Housing Corporation depositors are safe in the trust account to the extent these were so deposited and, secondly, that in any event this complaint is not about the misappropriation of the funds of the clients, but as stated in one or two of the affidavits which are attached to the complaint, it is about the allegation we are supposedly refusing to refund the Purchasers.*
3. *It is our bona fide belief that our dear colleagues **MESSRS KOIKANYANG INC** have withheld the full truth and facts from your esteemed office because they are bent on*

manipulating and abusing the rules and powers of the Law Society for their own disingenuous purposes. They have withheld the following background from your office:-

- 3.1 *Mothuloe Attorneys is a Plaintiff in a litigation against the **NORTH WEST HOUSING CORPORATION** and the **PROVINCIAL DEPARTMENT OF HOUSING, NORTH WEST PROVINCE** for contractual damages of over **R300m** which arose from a breach of contract after the **NORTH WEST HOUSING CORPORATION; M.E.C** and the **PREMIER** of the **NORTH WEST** committed breach;*
- 3.2 *The breach was committed by withholding the Power of Attorney from **MOTHULOE ATTORNEYS** for the conveyancing work extending over all the townships of the North West Province and thereby frustrating the instructions to us and instead appointing Messrs Koikanyang Inc for the same Project.*
-
- 3.7 *Messrs Koikanyang Inc are the Attorneys of record of the Department at present, in the litigation;*
- 3.8 *Messrs Koikanyang Inc have also been appointed to replace Mothuloe Attorneys in the Project, despite that there is a Court Order which awarded the tender to Mr Seriba and that such an appointment was against his consent. It is also against both the Court Order as well as the Settlement Agreement hereto annexed, let alone the two synchronized agreements, one with Mr Seriba and the other with the North West Housing Corporation*

which the Plaintiff, Mothuloe Attorneys, had for this conveyancing Project;

*3.9 Effectively therefore, Messrs Koikanyang Inc are the reasons why the breach was committed, why Mr. Seriba's project of the North West Housing Corporation did not proceed, why our conveyancing instruction did not proceed, why the Power of Attorney was not granted to us and why the Court Order in **SERIBA v NORTH WEST HOUSING CORPORATION** was literally aborted and does so with more than a veil of corruption!*

.....

3.16 All of those Agreements mention Mothuloe Attorneys as the conveyancers. We asked Messrs Koikanyang Inc to provide satisfactory vouchers of their mandate, the payments etc before we can refund the complainants. This has not been done. We also demanded from them an explanation or a concession to the effect that their demand of these funds from us is an acceptance by them that we were placed in these funds in our Trust Account by the respective owners thereof, who are now the complainants, pursuant to the contract we have with the North West Housing Corporation and the Department as each and every single one of these Offer to Purchase Agreements confirms;

3.17 They refused and we then made it clear that until they do so and fulfill our requirements, amongst others produce original vouchers, we are not going to release

the funds, lest we release such funds to either unauthorized persons or even fraudsters; and

3.18 On the contrary, every other would be Purchaser who had deposited monies into our Trust Account, who demanded refunds, and has no link to the "conflicted" Koikanyang Inc, we have refunded in full each in one complete payment not one cent short. We attach three random confirmatory examples of theses refunds as described further below.

.....

- 6. It is our intention to refund the depositors. We suggest that Messrs Koikanyang Inc should present their Originals of the deposit slips for authentication, whereupon we will pay the amount to them by Electronic Funds Transfer. The matter of the propriety and correctness of the position of Koikanyang Inc in this complaint should perhaps not prejudice the innocent members of the public in this regard.*
- 7. Despite our standpoint, if the Law Society deems it fit at any stage that we should release these funds to their respective purchasers, with or without our conditions, we definitely will We will even pay the funds to Messrs Kiokanyang Inc themselves, despite their conflict of interest position, if the Law Society so directs."*

[8] Despite what is stated in the letter, the applicant has steadfastly refused to pay the monies over to Koikanyang. The respondent states in

its answering affidavit that misappropriation of the monies cannot at this stage be excluded.

[9] It is apparent that the applicant's refusal to pay the monies over to Koikanyang is the result of its acrimonious dispute with Koikanyang concerning the fact that the applicant was deprived of its appointment as conveyancer of all the properties sold by the North West Housing Board for which it blames Koikanyang. The applicant's unilateral imposition of conditions for payment is inappropriate. Its lack of confidence in Koikanyang does not justify its refusal to account to its trust creditors and is misconceived.

[10] The respondent notified Mr Mothuloe on 24 March 2014 that he would be invited to appear before an investigating committee of the council for a discussion and consideration of the matter and a recommendation by the investigating committee to the council as to the way forward. Mr Mothuloe replied that he did not request the respondent to appear before such a committee, and refused to appear before the committee. On 7 April 2014 the respondent formally notified Mr Mothuloe to appear before the investigating committee on 14 May 2014. He responded in a letter dated 24 April 2014 in which he made scurrilous allegations against the respondent, such as that the respondent became complicit in a devious and unholy plot to cannibalise him and that the respondent acted maliciously and in a vexatious manner. He refused to

appear before the investigating committee. The committee resolved that an inspection of Mr Mothuloe's accounting records had to be conducted and Mr. Mothuloe was notified thereof on 23 May 2014.

[11] At the commencement of his argument, Mr Rossouw handed up an extract of interpleader proceedings which the applicant launched in the North West High Court in 2014 against a number of respondents, including Mr. Seriba (who I understand to be the estate agent involved in the selling of the properties), the North west Housing Corporation, Koikanyang, the respondent and what was referred to as the "*unknown claimants represented by the other respondents*". The applicant alleged in the interpleader notice that all of the respondents have made adverse claims to the money deposited in the applicant's trust account at the Standard Bank and that the applicant has as a consequence of the adverse claims paid the total amount of R413 212.67, the subject of the dispute, to the registrar of the court. It seems that none of the respondents opposed the application. The application was, nevertheless, dismissed by the court in a judgment by Leeuw JP for reasons which are not necessary to traverse. I was informed by Mr Rossouw that the money is still with the registrar.

[12] Mr Rossouw further informed me that the applicant's position remained the same, namely that Koikanyang had to prove its mandate from the clients on whose behalf they claimed repayment of the deposits

and that the individual claimants must prove their identity before it would repay their monies. It was submitted on behalf of the applicant that the two resolutions of the respondent's council were irrational because the reasons provided by the applicant for not paying the monies over were valid reasons.

[13] The applicant's reason for refusing to produce his records for inspection by the respondent is, in my view, misconceived. The respondent received several complaints against the applicant and Mr. Mothuloe. Koikanyang submitted complaints on behalf of nine of the applicant's trust creditors. The respondent also received complaints from some trust creditors directly. All the complaints relate to the handling of trust funds. The applicant appears to believe that the respondent should simply accept Mr Mothuloe's explanation for not repaying the trust creditors as valid, and that it should therefore not execute its statutory duty to investigate complaints which are *prima facie* serious. This is clearly an erroneous view.

[14] The respondent has pointed out in its answering affidavit that the applicant's accounting records must clearly and unambiguously reflect the available monies, the date of receipt thereof and the source of the payments. There should also be ledger accounts for each of the trust creditors and the applicant should have issued receipts to each trust creditor and retained a copy thereof. The respondent states that the fact

that the applicant demands proof suggests that its accounting records may not be in order or that the trust creditors cannot be identified. The refusal to pay trust creditors is a *prima facie* contravention of rule 68.7 and 68.8 of the respondent's rules.

[15] The respondent has further pointed out that an aspect which is of great concern to it is the fact that the applicant's rule 70 auditors' reports for the 2009 and 2013 financial years reflected that the complainants' monies were not at all times available in the applicant's trust banking account. In this regard, Mr Rossouw referred to par. 6.1 of the affidavit of Ms Mapfumo where she states with reference to the applicant's accountant's reports for the 2009 to 2013 financial years that the reports showed that the applicant had sufficient balances to cover the amounts in question over those years. The paragraph however goes on to state that this was without taking other creditors into account. It cannot be inferred, as was suggested, that if the other creditors were taken into account, there would still have been sufficient funds in the applicant's trust account to cover the amounts of the complainant's claims.

[16] All of the above clearly warrants an investigation by the respondent for which an inspection of the applicant's accounting and other records is required. It was, however, submitted by Mr. Rossouw that the powers of the respondent are limited by the principle of attorney and client privilege and that opening all of the applicant's client records would breach the

privilege of those clients that did not lay complaints with the respondent. He referred in this regard to s 71(2)(c) of the Act, which provides as follows:

In connection with the interrogation of any person who has been summoned under this section or the production by such person of any book, document, record or thing, the law relating to privilege as applicable to witnesses summoned to give evidence or to produce a book, document, record or thing in a civil trial before a court of law shall apply."

[17] Section 71 of the Act deals with disciplinary enquiries by the respondent's council. Section 71(2)(c) deals with the privilege of a person who has been summoned in terms of s 71(2)(a) to appear at a disciplinary inquiry and who is then interrogated, and with the production of any book, document, record or thing by such person. It does not apply to an inspection of an attorney's accounting and other records in respect of his or her clients. The investigative powers of the respondent in terms of s 70 are statutory powers which will override the attorney and client privilege. The privilege is, in any event, the client's privilege and cannot be invoked by the attorney to prevent an inspection of his or her records.

[18] In view of what is set out above, I find that the applicant has failed to make out a case for the review and setting aside of the decision of the respondent's council in terms of s 70(1) of the Act that the applicant must

produce for inspection any book, document or record which is in the applicant's possession or control which relates to the applicant's practice. It follows that the application must fail. It further follows that the respondent's counter application must succeed.

[19] In regard to costs, the customary order is to grant the respondent's costs on the attorney and client scale for the reason that the respondent is not an ordinary litigant and acts as the *custos morum* of the attorneys' profession.

[20] In the result, the following order is made:

- (a) The applicant's application is dismissed with costs on the attorney and client scale.
- (b) Prayers 1 and 2 of the respondent's counter application are granted.

For the applicant: Adv. D P J Rossouw SC

Instructed by: Friedland Hart Solomon & Nicholson Inc.

For the respondent: Mr P J Smith, Rooth & Wessels Attorneys