

SOUTH AFRICA / JUDGMENT

Claasen and Another v Free State Law Society and Others (5940/2017) [2020] ZAFSHC 47 (28 February 2020) [2020] ZAFSHC 47

COURT

Free State High Court, Bloemfontein

BEFORE

Molitssoane

CASE / FILE NUMBER

5940/2017

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FREE

STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC

OF SOUTH AFRICA

Reportable:

NO
Of
Interest to other Judges: NO
Circulate
to Magistrates: NO
Case
No: 5940/2017
In
the matter between:-
ANNA
CATHARINA CLAASEN
1st APPLICANT
JOLUZA
BOERDERY (PTY) LTD
2nd APPLICANT
and
THE
FREE STATE LAW SOCIETY
1st RESPONDENT
FREDERICK
JACOBUS SENEKAL
2nd RESPONDENT
MATSEPES
INC

3rd RRESPONDENT

HEARD: 30 JANUARY 2020

JUDGMENT

BY: MOLITSOANE, J

DELIVERED: 28 FEBRUARY 2020

- [1] This is an application that an order of costs granted by Loubser, J delivered on the 12 April 2018, be rescinded and set aside. The parties herein appear as in the main application. The First Respondent opposes the application. The Second and Third Respondents abide by the decision of this court.
- [2] During November 2017 the Applicants brought an urgent application to compel the First Respondent, as the then governing body, to launch an application to this court for the suspension of the Second Respondent, an attorney of this court, pending finalisation of an application to have the Second Respondent struck from the roll of attorneys.
- [3] On 12 April 2018 Loubser, J dismissed the said application with costs on attorney and client scale, which included the costs incurred in the postponements of the 17 November 2017 and 14 December 2017 in favour of the first respondent. He made no costs order against the Second and Third Respondents.
- [4] It is the case for the applicants that on 29 March 2018, during the hearing of the first application, the First Respondent failed and / refused to disclose to the court that the investigation based on the complaint of both applicants against the Second Respondent had been finalised and that there was sufficient evidence to launch an application to seek his suspension from practise.
- [5] This view is premised on the following:

The applicants contend that had the court been apprised of this information it ‘would not have dismissed the application with costs on an attorney and client scale, but in all probability, would have granted the Application with costs’[1]. The gravamen of the complaint by the applicants is that the First Respondent obtained the order fraudulently by failing to disclose the information as indicated.

- [6] The first issue, on the other hand, raised by the First Respondent is that the contentions raised herein were finally adjudicated in the main application and this court is thus functus officio. The First Respondent contends thus that rescission of judgment does not avail the applicants and the proper course to follow in this matter is either an appeal or review. It is appropriate to consider, firstly, these two contentions as the success of either would have the effect of disposing this application.

- [7] At common law a judgment may be set aside on account of fraud[2].The requirements for setting aside a judgment on the basis of fraud are the following:
- i. That the successful litigant was a party to the fraud;
 - ii. That the evidence was in fact incorrect;
 - iii. That it was made fraudulently and with intent to mislead; and
 - iv. That it diverged to such an extent from the true facts that the court would, if the true facts had been placed before it, have given a judgment other than that which it was induced by the incorrect evidence to give.
- [8] The applicants bear the onus to prove the existence of the abovementioned requirements. At the onset it has to be borne in mind that the applicants do not wish to rescind the judgment of Loubser, J. What the applicants seek to do is to reverse the cost order granted. It thus follows that if I were to find that the order by Loubser J was obtained fraudulently the proper course would be to set the same aside.
- [9] The high water mark of the case for the First respondent before Loubser, J was that investigations against the Second respondent was on going and not yet finalised. Loubser, J pointed out that the complaint by the applicants were not the only complaints against the First Respondent[3].In this case, it is clear that the First respondent was in the process of investigating a professional misconduct against the Second
- Respondent. To contend that the investigation against the First Respondent was complete at the time of the enrolment of the application before Loubser, J cannot be correct.
- [10] Section 71(1) of the Attorneys Act sets out the procedure to be followed by the Council in the enquiry for professional misconduct. Sections 2(a)(i) and (ii) empowers the Council to summon any person(including the Second Respondent) to appear before it, to be interrogated or to produce any document or record in the possession of the said person. Section 72 confers certain disciplinary powers to the Council conducting an enquiry in terms of s71 of the Act. These include the power to impose certain prescribed sanctions. Section 72(6)(a) on the other hand, confers the Council to apply for the suspension and struck off of a practitioner against whom an enquiry is being or has been conducted.
- [11] It resonates with the rule of natural justice that a practitioner should be apprised with the charges against him in order to prepare for his/her defence. The First Respondent is obliged to act responsibly from the point of view of its member's interest and it must institute its investigations with the necessary care[4]. The letter dated 2nd February 2018 with a copy of the charge sheet, which the applicants assert demonstrate that the investigation was completed before the first application was heard; clearly show that it is a Notice calling upon the second respondent 'to give reasons why the Council should not proceed with [his] suspension applications'. The said notice further indicates that the Council [of the First Respondent] reserved its right to proceed with the application should the Second

Respondent fail to appear.

- [12] What the Council sought to achieve with the notice was to afford the Second Respondent the opportunity to respond to the allegations levelled against him. Once the Second Respondent had received the notice he could deal with same as he deemed fit. He could give an explanation acceptable to the Council which explanation might put to rest the whole or part of investigation against him or he could give an explanation which in the opinion of the Council might not be acceptable. Worst still he might choose to ignore the notice. It is thus of importance that as part of the investigation a practitioner should be apprised of the complaint, and afforded an opportunity of answering it, before a drastic step is taken[5].
- [13] The Council, when it sought the response from the Second Respondent, was in the process of investigating the complaints. Loubser, J in my view correctly pointed out that the First Respondent should be afforded the opportunity to take steps without undue pressure.
- [14] In my view the applicants have not demonstrated any fraud on the part of any of the respondents before me. The fact that information on the alleged charges was withheld is not indicative of the intention to defraud. As alluded to above there were more complaints being investigated against the Second Respondent, for example, the referral by Lever, AJ from the Northern Cape Division of the High Court. That complaint (if one were to term it so) by Lever AJ had also not been completed. The conduct of the First respondent must also be looked at against the peremptory provisions of Rule 50.19 as set out in Government Gazette No 39740 dated 26 February 2016 which provides 'that the disciplinary enquiry committee shall, save to the extent set forth in these rules, preserve the confidential nature of all its enquiry proceedings'. There was no reason to disclose fully the charges against the Second Respondent in the application before Loubser, J as to do so would in all likelihood have led to their interrogation in a forum which was not appropriate to deal with them.
- [13] It would appear that Counsel for the First Resondent disclosed to the court that the Second Respondent would be required to plead to specific charges before the Society in the future[6]. That in my view was enough. I cannot find that the First or Second respondent committed fraud herein.
- [14] In the absence of the alleged fraud I now turn to the issue of whether this application was finally adjudicated upon and consequently if the defence of res judicata should be upheld. The fundamental issue here is whether the same relief is sought in the two applications, or put differently whether this issue before this Court has been finally disposed of in the first application.
- [15] In my view the question has to be answered in the positive. The court in Prinsloo NO v Goldex[7] set out the requirements of res judicata as follows:

"In our common law the requirements for res judicata are threefold:

- (a) same parties, (b) same cause of action, (c) same relief.” In the absence of proof of allegations of fraud it is clear that the applicants sought to reverse the costs order by back door. The three requirements for the defence of *res judicata* are glaringly present in this matter. What is also clear to me is that the applicants take no issue with the findings and conclusions of Loubser, J. I am of the view that they have accepted that they are correct. The proper course for the applicants is to appeal the decision of Loubser, J. The application for rescission of the order of costs must fail.
- [16] It is trite that the successful party should be awarded the costs and that this rule is not to be departed from except on good grounds. It is further trite that the granting of costs is in the discretion of the court. The applicants in this case do not attack the correctness of the judgment of Loubser, J. I am essentially being called upon to speculate as to what Loubser, J could have done had the information complained of had been made available to him. If I were to so I would be venturing into dangerous unlawful speculation. The award of costs falls squarely in the discretion of the court seized with the matter as Loubser, J was. I am of the view that the applicants have not made up a proper case for rescission of the order of costs herein. I accordingly make the following order:

ORDERS

1. The application is dismissed with costs.

P.E. MOLITSOANE, J

On behalf of the Plaintiff: Adv. D.M Grewar

Instructed by:

Azar and Havenga

BLOEMFONTEIN

On behalf of the Defendant Adv F.J Janse Van Rensburg

Charl Van der Merwe attorneys

- [1] Page 16 par 5 of the paginated papers.
- [2] *Rowe v Rowe* 1997(4)SA 160 (SCA) 166 G-J.
- [3] See par [12] of judgment of Loubser, under same Case number.
- [4] See *Vereeniging van Advokate van SA v Theunissen* 1979(2) SA 218 at 222
- [5] *Ford v Law Society of Rhodesia* 1977(4) SA RAD 175 at 194 C-D
- [6] See par [8] of the judgment of Loubser, J
- [7] 2014(5) SA 297 at 305 pa [23] his findings are clearly correct

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Prepared on 12 October 2026 · Esheria