
SOUTH AFRICA / JUDGMENT

Eastern Cape Society of Advocates v Jacobs (2232/2011) [2012] ZAECPEHC 51 (20 August 2012) [2012] ZAECPEHC 51

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

N Dambuza, G G Goosen

CASE / FILE NUMBER

2232/2011

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IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – PORT
ELIZABETH)

Case

No.: 2232/2011

Date

heard: 23 March 2012

Date

delivered: 20 August 2012

In the matter between: EASTERN
CAPE SOCIETY OF ADVOCATES
Applicant
and
LIONEL DUDLEY JACOBS
Respondent

JUDGMENT

DAMBUZA, J:

This is an application to have the respondent's name struck off the roll of advocates in terms of section 7(1)(d) of the Admission of Advocates Act, Act 74 of 1964 ("the Act").

The applicant is the Eastern Cape Society of Advocates, a society of advocates as envisaged in section 7(2) of the Act. It brings this application against the respondent, an admitted advocate of this Court. The application is brought on two grounds; firstly, that the respondent was convicted of theft by the Regional Court, Port Elizabeth and that on 12 October 2010, his appeal against that conviction was dismissed by Judges Pickering and Revelas of this Court. The respondent had been convicted for theft of R7,368.00 and had been sentenced to a fine of R4 000,00 or two years imprisonment, together with a further period of three years imprisonment, the whole of which was suspended for four years on certain conditions. In the appeal judgment, the Registrar of this Court was directed to deliver a copy of the judgment to the secretary of the applicant. It is that order which resulted in this application. The second ground on which the application is brought emanates from results of investigations conducted by the applicant which, according to the applicant, reveal the respondent's involvement in a "pyramid scheme".

Criminal proceedings in which the respondent has been charged with fraud relating to that pyramid scheme are pending before the

Regional Court, Port Elizabeth.

This application is opposed. The respondent contends that the application was brought prematurely. He states that he did communicate his intention to petition the President of the Supreme Court of Appeal regarding the refusal of his application for leave to appeal against the appeal judgment.

The record reveals that following the dismissal of the respondent's appeal on 12 December 2009 the applicant resolved that this application be brought against the respondent. The application was launched on 2 September 2011 and was served on the respondent sometime in October 2011. On 14 October 2011 the respondent filed a notice of intention to oppose the application, followed by his answering affidavit on 27 October

2011. It is in his answering affidavit that the respondent stated that he had expressed his intention to petition the President of the Supreme Court of Appeal. In that answering affidavit the respondent also stated that he had already drawn his petition to the Supreme Court of Appeal and was in the process of drawing papers for an application for condonation of the late filing thereof, which he intended to file with the Registrar of the Supreme Court of Appeal during November 2011.

The respondent's contention is that this application should await the results of his petition to the President of the Supreme Court of Appeal. But when the matter came before me on 22 March 2012 the respondent had not filed any substantive application for postponement of the application. There was also no evidence that he had filed his petition with the Registrar of the Supreme Court of Appeal. In insisting before me, that the application should proceed, Mr Swanepoel SC who appeared on behalf of the applicant together with Ms Zietsman, submitted that the respondent's submissions regarding his intention to petition the President of the Supreme Court of Appeal were only an attempt by him to delay the hearing of this application and that, in any event, his opposition to the application has no merit.

The history preceding the application coming before me on 22 March 2012 is that, after the respondent was served with the papers in this application in October 2011, he filed his answering affidavit as already stated. The matter was then set down for hearing on 2 February 2012. On that day it was postponed to 22 March 2012 to afford the respondent to file his petition with the Registrar of the Supreme Court of Appeal. The applicant had, prior to 2 February 2012, served on the respondent a notice in terms of Rule 35(12) in terms of which it required the respondent to produce for inspection his petition to the Supreme Court of Appeal and his

application for condonation of the late filing thereof. It was common cause before me that the respondent had failed to produce

these documents. When the matter was postponed on 2 February 2012 the Court also ordered the respondent to file his Heads Of argument by 16h00 on 6 February 2012 and to reply to the applicant's notice in terms Rule 35(12) by the same day and time. This was in anticipation of the application being heard on 22 March 2012. The terms of the court order of 2 February 2012 had been agreed on between the parties prior to that date. The respondent did not comply with that order in that he did not produce, to the applicant, a copy of his petition to the Supreme Court of Appeal. On 1 March 2012 the applicant obtained another court order in terms of which the respondent was ordered to reply to the notice in terms of Rule 35(12) by 7 March 2012. He, again, failed to comply with the order.

When the matter came before me Mr Swanepoel insisted, on behalf of the applicant, that because the respondent had, without explanation, repeatedly failed to file his petition with the Registrar of the Supreme Court of Appeal, the application should be heard on that day. Ms Kerry Lynne Watt, the applicant's honorary secretary, had filed an affidavit in which she stated that she had confirmed with the Registrar of the Supreme Court of Appeal, two days before the hearing of the application (i.e. 20 March 2012) that the respondent had not filed any petition with that office. An email from the office of the Registrar of the Supreme Court of Appeal confirming that no petition had been filed with that office forms part of the record. It was also not in dispute that no such petition had been served on the

office of the Director of Public Prosecutions in Grahamstown; that being the office that had represented the State in the criminal

trial and the subsequent appeal.

At the hearing of this application the respondent, who appeared in person, still sought yet another postponement. He explained from the bar that the “documents” had been faxed to the office of the Registrar of the Supreme Court of Appeal and that the delay in filing them and/or providing the Court and the applicant with proper proof of service had been due to inexperience on his part. He stated that he had not been aware of the court orders of 2 February 2012 and 1 March 2012 directing him to produce a copy of the petition to the applicant.

I was persuaded that the respondent’s plea for a further postponement was, indeed, a further attempt at delaying the hearing of the application. The respondent had undertaken, as far back as in October 2011, to file his petition with the Registrar of the Supreme Court of Appeal in November 2011. The appeal judgment had been handed down a year before he made the undertaking. He had furnished no explanation as to why the petition had not been filed within the period prescribed by the Rules of Practice in this Court, or within a reasonable time thereafter. There was also no explanation as to why he did not file the petition in November 2011 as he had undertaken. Further, the Rule 35 Notice had been served on his attorneys of record on 13 January 2012. The application to compel him to produce the petition was served on the respondent’s attorneys on 27 February

2012. It was not in dispute that on the 31 January 2012 the applicant’s attorney Mr Michael Nunn had had several telephone conversations with the respondent during which it was agreed between the two of them that on 2 February 2012 the application would be postponed to 22 March 2012 and that the respondent would file his Heads of Argument as well as his response to the Rule 35 Notice by close of business on 6 February 2012. It was also not in dispute that on 1 February 2012, Mr Nunn had sent to the respondent by email, the draft of the order that the applicant would seek when the application came before court on 2 February

2012. As I stated, the draft order provided that the matter would be postponed to 22 March 2012; that the respondent would file his Heads of Argument and reply to the Rule 35(12) Notice by 6 February 2012 and that the costs occasioned by the postponement

would be reserved. An email in which the respondent agreed to that draft order being made an order of court is part of the record.

After the draft order had been made an order of court on 2 February 2012, a copy thereof was served on the respondent’s attorneys and another copy was sent to the respondent by email. And, indeed the respondent did file his Heads of Argument on 6 February 2012. On 10 February 2012 Mr Nunn sent an email acknowledging that the respondent had filed his Heads of Argument as per court order of 2

February 2012, and drawing his attention to the failure to produce the petition as ordered by court. He gave the respondent until the 17 February 2012 to respond to the Rule 35 Notice. All these facts were not in dispute before me. I could only conclude therefrom that the respondent’s

explanation to me, that he had not been aware that he had to comply with the Rule 35 notice, was not true. Further, apart from stating that his prospects of success on appeal were good, the respondent did not set out any reasons as to what this contention was based on or which portions of the appeal judgment were likely to be reversed by the Supreme Court of Appeal; nor did he respond pertinently to the allegations of involvement in the pyramid scheme, apart from stating that criminal proceedings in respect of the fraud charges were pending in the magistrates court. I was therefore of the view that the respondent had not made out any case for the postponement that he sought and that he had, in fact, been grossly dilatory in dealing with this application. For this reason I ordered that the matter proceed on that day.

Regarding the merits of this application section 7(1)(d) of the Advocates Act 74 of 1964 (“the Act”), in terms of which this application is brought, provides that a court may, upon application, suspend any person from practice as an advocate, or order that the name of such a 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 practice as an advocate”. According to Section 7(2) of the Act, the Society of Advocates for the division which made the order for the advocate’s admission to practice as an advocate may bring the application for the striking off.

It is common cause that the order admitting the respondent as an advocate was made by this court. It is also common cause that at the time of the events from which the charges against the respondent emanated, he had been practicing as an advocate in Port Elizabeth.

In *De Freitas v Society of Advocates of Natal* 2001 (3) SA 750 the court explained the nature of the court’s authority in applications of this nature as follows:

“At the outset it is necessary to remind oneself of the role of the Courts in matters of this kind. Since Mr De Freitas is not a member of the Society of Advocates he is neither bound by the latter’s rules nor subject to its internal disciplinary jurisdiction. But it is trite that the Courts have inherent disciplinary powers over practitioners in cases of misconduct or unprofessional conduct.....In

De Villiers at 456 Innes CJ said:

‘The interference of the court is clearly justified where there has been gross mis-discharge of professional duty. So also where the conduct proved, whether criminal or not, is so morally reprehensible that the person guilty of it is clearly unfit to become or remain a member of the profession. But when we leave the area of criminality, immorality or actual misconduct the enquiry becomes more complicated.’

In the latter type of case interference by the Court is ultimately a matter of judicial discretion.....In other words, it is for the Court to consider the propriety of the conduct proved and, if it is found to be unprofessional, what the penalty should be. In doing so it must take account of all the circumstances of the case with due regard to the demands of the proper administration of justice, and the interests of the profession and the public”.¹ (my emphasis)

In *General Council of the Bar of South Africa v Matthys* 2002 (5) SA 1 Heher JA held that:

“The court has first to decide whether the alleged offending conduct has been established on a preponderance of probability and, if so, whether the person is a fit and proper person to practice as an advocate. Although the last finding involves, to some extent a value judgment, it is in essence one of making an objective finding of fact and discretion does not enter the picture. But once there is a finding that he is not a fit and proper person to practice, he may, in the court’s discretion either be suspended or struck off the roll”²

With the approach set out in the authorities referred to above in mind I turn to the facts in this application. The respondent was admitted as an advocate on 30 March

2000. On 17 October 2001 a provisional order was granted by this Court declaring the respondent to be insolvent. The order was confirmed on 12 December 2001.³ At the time of the hearing of this application he had not been rehabilitated.

It is not clear from the papers when it is that the respondent started practising as an advocate in Port Elizabeth but it is not in dispute that he was a member of the Independent Bar and that he shared offices in his Port Elizabeth practice with Bruce Bok who also practised as an advocate and a member of the Independent Bar. The respondent accepted moneys from clients, but had no bank account due to his estate having been sequestrated. He therefore used Bok’s cheque account to run his practice. The respondent also had no bookkeeper and did not keep proper books of account. The record reveals that at the criminal trial he admitted that neither his nor Bok’s accounting skills were “up to standard but we had some idea of what was paid in what”. He admitted that the moneys paid to him were not administered correctly. At the time of the hearing of his application he practiced as an advocate in the Western Cape and was a member of the Independent Advocate’s Association of South Africa (IAASA). He had never been a member of any of the constituent Associations of the General Council of the Bar.

In the respondent’s appeal against his conviction for theft the appeal court found that the respondent’s conduct was unprofessional. I agree. The danger of advocates handling funds without safety nets such as those provided by the Attorney’s Act has been repeatedly highlighted by the courts.⁴ The following remarks made by Hefer ACJ (as he then was) in *De Freitas* are appropriate:

“There is, moreover, a more obvious reason why an advocate should not perform the functions of an attorney. It is that, unlike attorneys,

advocates are not required to keep trust accounts. In terms of the Attorneys Act 53 of 1979 every attorney shall open and keep a separate trust banking account and deposit therein money held or received by him on account of any person. No amount standing to the credit of such an account shall be regarded as forming part of the assets of the practitioner or may be attached on behalf of any of his creditors; and, equally importantly, any shortfall in the account may, in proper circumstances, be recovered from the Fidelity Fund. A client who does not employ an attorney and instructs an advocate directly does not have the same protection or any protection at all.”

It is common cause that in his practice the respondent accepted instructions from members of the public without the intervention of an attorney or attorneys; he accepted moneys directly from members of the public without keeping a separate trust banking account and without being in possession of a fidelity insurance, or keeping proper books of account as obliged to do so in terms of sections 78 and 79 of the Attorneys Act 53 of 1979.

In the appeal judgment Pickering J cited, with approval, the paragraph in De Freitas referred to above. Reference to that judgment is made in the applicant's Heads of Argument. Yet when Mr Swanepoel made submissions before me, relying on the judgment in De Freitas the respondent responded by stating that he was not aware of the court's decision in De Freitas, a statement which, in my view, reveals a serious lack of basic litigation and which is an indication that the respondent is not a fit and proper person to practice as an advocate. In fact I can only conclude, from the manner in which the respondent conducted his own case in this application, that he poses danger to members of the public who might turn to him for assistance with their legal affairs.

It is in this context that I formed the view that the respondent's expressed intention to lodge a petition against the appeal judgment was only an attempt to delay the obvious outcome of this application. But even if the respondent was bona fide in his intention to lodge such a petition there are no reasonable prospects that the intended application to the President of the Supreme Court of Appeal will succeed. The common cause or undisputed facts referred to above constitute evidence which proves gross unprofessional conduct on the part of the respondent. Such conduct does not only relate to the general manner in which he conducted his practice but is proved in the conviction for theft emanating from criminal charges laid by his erstwhile

client Mr Thyssen. Mr Thyssen, a builder, approached the respondent during November 2001 seeking legal advice when certain of his workers laid complaints against him with the Industrial Bargaining Council. The respondent quoted him a professional fee of R2 000,00 to which Mr Thyssen agreed. From time to time commencing on 25 November 2001, Mr Thyssen paid moneys amounting to R13 976,00 to the appellant. The purpose of such payments was to enable the respondent to negotiate with the Bargaining Council concerning the workers' complaints and to pay to that Council such amounts as were eventually agreed upon. It is common cause that the Bargaining Council refused to accept such lesser amounts as were tendered on behalf of Mr Thyssen by the respondent, and that none of the money was paid over to the Council by the respondent. It is further common cause that all the money paid by Mr Thyssen to the respondent was paid by the respondent into Mr Bok's account.

At some stage Mr Thyssen terminated the respondent's mandate to represent him but did not receive a full refund of moneys that were paid by him to the respondent. The charge of theft and the ensuing conviction relate to the portion of the funds which the respondent failed to refund to Mr Thyssen.

It is significant that it is not the respondent case that Judges Pickering and Revelas erred by relying on his admissions to unprofessional conduct. He does not deny having admitted during the criminal trial that his and Mr Bok's financial relationship was "very unusual", "very unorthodox" and "totally unprofessional". He stated that "all the money that we collected in, there was a mixture of the monies and I am in full agreement of the criticism, it was not administered correctly". Explaining how he kept track of the moneys that were paid to him in the absence of any proper books of account he stated that Mr Bok "would draft us a statement of account at the end of the month more or less just to say what is our expenses and so forth". He also stated that he "could not bank at that stage because my estate was provisionally sequestered. So the bank froze all my accounts".

I am satisfied that the conviction of theft and dismissal of the respondent's appeal, sufficiently proves misconduct on the part of the respondent. But even if I were to disregard the conviction, the underlying common cause facts relating to the manner in which the respondent dealt with funds received by him from Mr Thyssen and his other clients shows a total disregard of basic rules of practice, a conduct which placed his clients at great risk regarding their legal affairs. In fact it is evident that he should not have been accepting funds if he was unable to run a bank account.

Regarding the respondent's allegation involvement in the pyramid scheme, at the time of the hearing of this application, criminal proceedings against the respondent were still pending in the Regional Court, Port Elizabeth. In that criminal case the respondent is charged with 313 counts of fraud relating to money lending business conducted by him and his two co-accused under the name "EP Consultants". The allegations in the charge sheet which forms part of the record in this application are that EP Consultants started as a money lending business which was founded on financial contributions from various persons. The state alleges that the money lending business evolved to a pyramid scheme as the business became unable to pay out monthly interest to its investors. EP Consultants "collapsed" in May 2001.

The criminal charges of fraud relate to investors who remained unpaid after the collapse of the pyramid scheme. The respondent had pleaded "not guilty" to the charges. In this application he responds to the allegations contained in the founding affidavit, by stating that he remains innocent until proved guilty. However he admits his involvement in EP Consultants and explains that he suffered a great financial loss as a result of his involvement in the business. He does not dispute the nature of the business conducted under EP Consultants. In an affidavit which forms part of the record, Mr Bok states that the respondent was the person in charge of the operations of EP Consultants. This allegation is not disputed by the respondent. The undisputed allegations once again become evidence and proof of misconduct and unprofessional conduct on the part of the respondent.

Regarding the appropriate sanction, I am satisfied that the respondent's conduct merits that he be struck off from the roll of advocates. As I have stated, the respondent's conduct show a serious lack of appreciation of basic rules of practice. He conducted his practice in a manner that placed

his clients at great risk of financial loss whilst he had no security in place to reimburse or compensate them in case of loss. He engaged in acts of blatant criminal conduct. His conduct brought the legal profession into disrepute. I am of the view that members of the public need to be protected from him and that this can only be achieved by his removal from the realm of legal practitioners.

Consequently the following order shall issue:

The respondent's name is struck off the roll of advocates;

The respondent is ordered to pay the costs of the applicant's attorneys.

N. DAMBUZA

JUDGE OF THE HIGH COURT

GOOSEN, J:

I agree.

G.G. GOOSEN

Appearances:

For the applicant: Adv M.G. Swanepoel (SC) and Adv T. Zietsman

Instructed by Whitesides Attorneys,

Grahamstown

For the respondent: In person

1 At 755

2 At 5

3 Master's Reference E281/2001

4 De Freitas at 758F and 764H

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