

SOUTH AFRICA / JUDGMENT

Legal Practice Council v Spies (55628/20) [2022] ZAGPPHC 694 (16 September 2022)

[2022] ZAGPPHC 694**COURT**

North Gauteng High Court, Pretoria

BEFORE

Mpofu, JS Nyathi

CASE / FILE NUMBER

55628/20

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NO: 55628/20****REPORTABLE:**

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

YES

13

SEPTEMBER 2022

IN

THE MATTER BETWEEN:

LEGAL

PRACTICE COUNCIL

APPLICANT

AND

JO

FRANCOIS SPIES

RESPONDENT

JUDGMENT

MPOFU AJ

INTRODUCTION

- [1] This is an application in terms whereof the South African Legal Practice Council, (the 'LPC') seeks an order to remove the respondent's name, Jo Francois Spies, from the roll of attorneys of this Court, alternatively, that the respondent be suspended from practising as an attorney. The applicant also seeks other ancillary relief, as will become clear later in this judgment.
- [2] Briefly, the applicant is the custodian and repository of the rules of the conduct of the legal profession, it also plays an oversight role over the conduct of legal practitioners.
- [3] Furthermore, the applicant discharges its mandate through the application of the Legal Practice Act, 28 of 2014, (the 'LPA'), and effectively succeeds the Law Society of South Africa and its provincial arms, (the Law Society).
- [4] The respondent was admitted on the Roll of attorneys on 19th July 2001. Through the period, he practised as a sole practitioner under the name and style of Spies JF Attorneys, in Mokopane, Limpopo.

BACKGROUND**FACTS**

- [5] The applicant alleges that the respondent contravened several provisions of the LPA and rules of the Law Society, attorneys profession, legal practice rules and code of conduct in that:

[a] He failed to submit his firm's Auditor's Report for the financial periods ending 28 February 2017; 28 February 2018 and 28 February 2019.

[b] He practised without Fidelity Fund certificates from 01 January 2018 to date.

[c] He failed to effect payment of his mandatory LPC annual membership fees in respect of 2019 and 2020, totalling R8 120.00, (Eight Thousand, One Hundred and Twenty Rand)

- [6] Furthermore, that the respondent was summoned to appear before a disciplinary committee of the Council of the Law Society which was scheduled for 23rd November 2017 to answer to charges of unprofessional, dishonourable or unworthy conduct in contravention of Rule 35, 22 read with Rule 35, 23 and 35,19 of the Rules for the Attorney's profession, in that, he failed to furnish the Law Society within six months after the annual closing of his books of account, a report in its original format by his Auditor or inspector for the period ending 28 February 2017.

- [7] The respondent failed to attend the disciplinary hearing as a result of which a further charge in terms of Rule 47.3 of the Rules for the Attorneys profession was added to the aforementioned charges.
- [8] The respondent was again summoned to appear before a disciplinary committee to be held on 14th February 2018 to face charges of unprofessional, dishonourable, unworthy conduct in contravention of Rule 35.22 read with Rules 35.23 and 35.19, and Rule 47.3 read with Rule 47.2. Save for the foregoing, respondent failed to attend yet again.
- [9] On 27th July 2018, the Council addressed a letter to the respondent enclosing a report from the disciplinary committee in keeping with Rule 50.18.2 of the Attorneys profession.
- [10] The Council further requested the respondent to provide reasons why an application should not be brought for the removal of his name from the Roll of practising attorneys. The respondent did not furnish such reasons, notwithstanding the Council's lawful and reasonable request.
- [11] In addition to the respondent's contravention of the Law Society and /or LPC Rules as discernible herein above, one Sean Balfour Mervor (Mervor), respondent's family friend reportedly, also lodged a complaint against the respondent on 5th July 2017. Mervor allegedly instructed respondent to draw up an ante nuptial contract, (ANC), in his favour, to regulate his marriage to his fiancée. In the ensuing mandate, respondent allegedly undertook not to charge Mervor for drafting the ANC, save for fees and disbursements due and payable in favour of respondent's correspondent attorneys who were based in Pretoria.
- [12] According to the complaint, Mervor discovered that the antenuptial contract was never registered at the Deeds Office, furthermore, Mervor did not receive a receipt acknowledging the R 1 000.00, (One Thousand Rand), paid towards the fees of the aforesaid correspondent attorney. As a consequence of respondent's aforesaid remiss conduct, the correspondent attorney failed to execute his instructions to lodge and register the antenuptial contract at the Deeds Office.
- [13] Save for the foregoing, the Law Society referred Mervor's complaint to the respondent on 18th August 2017, also requesting respondent to comment thereon on or before 18th September
2017. Save for the foregoing, respondent failed to heed applicant's lawful and reasonable request by favouring it with the courtesy of a reply or comment in response to the complaint.

ISSUES

TO BE DECIDED

[14] The pith of the applicant's application is that the respondent is no longer a fit and proper person to practice as an attorney when viewed in light of respondent's aforementioned conduct in its entirety, which conduct constitutes aberrant deviation from the standards of professional conduct set by the Law Society and its successor, the LPC.

[15] This Court is confronted with the following:

[a] The task of making a judgment call whether as a matter of fact, the offending conduct on respondent's part has been established;

[b] In the event of the Court being satisfied that the offending conduct has been established, a value judgment is required to decide whether respondent is not a fit and proper person to practice as an attorney; and.

[c] If the Court decides that the respondent is not a fit and proper person to practice as an attorney, it must decide in the exercise of its discretion within all the circumstances of the case the attorney in question is to be removed from the roll or merely suspended from practice. Ultimately this is a question of degree.

[16] Based on the facts presented and before it, this Court is clothed with the exercise of its discretion. For this reason, such facts must be proven on a preponderance of probabilities. Such exercise of discretion also calls for a consideration of the facts in their entirety; and each issue must be considered in isolation.

FACT BASED INFRACTIONS OF THE RULES

The respondent's repeated failure to comply with rule 70 auditor's report

[17] Notwithstanding annual calls from the LPC, it is beyond argument that for an uninterrupted period of 3 (three) years, to wit, February 2017, February 2018 and February 2019, respondent failed to submit his auditor's reports.

Respondent's failure to attend to attend his disciplinary enquiry

[18] It is common cause that respondent failed to attend a disciplinary enquiry when invited to do so to answer to allegations which were levelled against him.

Practising without a fidelity fund certificate

[19] Respondent has been practising without a Fidelity Fund Certificate. An inference is capable of being drawn without equivocation that the respondent was practising without a Fidelity Certificate because he did not submit his auditor's reports as alluded to. No explanation was proffered by the respondent for this material breach of the rules.

Respondent's failure to enter into intention to oppose applicant's application and file an answering affidavit thereto

- [20] Since this application was initiated, the respondent did not file an intention to oppose it, neither did he file an affidavit in answer thereto.

SURVEY AND ANALYSIS

- [21] The requirement of and purpose of submitting annual audit reports is to satisfy the LPC that an attorney's accounting records are kept in accordance with the provisions of Rule 70 and Rule 39.11 of the LPA. This includes that attorneys are enjoined to handle and administer trust funds entrusted upon them by their clients in a manner prescribed by the said Rules. Consequently, a failure to submit these reports constitutes a breach of rule 70 and Rule 39.11.
- [22] With the court having found that the offending conduct has been established as evinced above, the court then exercises a value judgment, to arrive at a decision whether the respondent is a fit and proper person to practice as an attorney. The court has regard to all the circumstances of the case and proceeds to determine whether the respondent should be removed from the roll or to impose a period of suspension from practice for a specified period or to impose a fine where appropriate.
- [23] In *Malan & Another v Law Society of the Northern Provinces*,^[1] the SCA pronounced that this ultimately boils down to a question of degree.^[2]
- [24] For present purposes, it is convenient to take cognizance of the self-explanatory yet meritorious enunciation of the self-same SCA case, regarding respectively, the second and third phase of the inquiry, namely,

"[5] As far as the second leg of the inquiry is concerned, it is well to remember that the Act contemplates that where an attorney is guilty of unprofessional or dishonourable or unworthy conduct different consequences may follow. The nature of the conduct may be such that it establishes that the person is not a fit and proper person to continue to practise. In other instances, the conduct may not be that serious and a law society may exercise its disciplinary powers, particularly by imposing a fine or reprimanding

the attorney (section 72(2)(a)). This does not, however, mean that a court is powerless if it finds the attorney guilty of unprofessional

conduct where such conduct does not make him unfit to continue to practise as an attorney. In such an event the court may discipline

the attorney by suspending him from practice with or without conditions or by reprimanding him: *Law Society of the Cape of Good Hope v C* 1986 (1J SA 616 (AJ at 638l-639E; *Law Society of the Cape of Good Hope v Berrange* 2005 (SJ SA 160 (C) at 1730-1, (2006) 1 AH SA 290 (C) at 302.

- [6] As pointed out in *Jasat*, the third leg is also a matter for the discretion of the court of first instance, and whether a court will adopt the one course or the other depends upon such factors as the nature of the conduct complained of, the extent to which it reflects upon the person's character or shows him to be unworthy to remain in the ranks of an honourable

profession, the likelihood or otherwise of a repetition of such conduct and the need to protect the public. Ultimately it is a question of degree. It is here where there appears to be some misunderstanding.

- [7] First, in deciding on whichever course to follow the court is not first and foremost imposing a penalty. The main consideration is the protection of the public.
- [8] Second, logic dictates that if a court finds that someone is not a fit and proper person to continue to practise as an attorney, that person must be removed from the roll. However, the Act

contemplates a suspension. This means that removal does not follow as a matter of course. If the court has grounds to assume that after the period of suspension the person will be fit to practise as an attorney in the ordinary course of events, it would not remove him from the roll but order an appropriate suspension. In this regard the following must be borne in mind:

"The implications of an unconditional order removing an attorney from the roll for misconduct are serious and far-reaching. Prima facie, the Court which makes such an order visualises that the offender will never again be permitted to practise his profession because ordinarily such an order is not made unless the Court is of the opinion that the misconduct in question is of so serious a nature that it manifests character defects and lack of integrity rendering the person unfit to be on the roll. If such a person should in the years apply for re-admission, he will be required to satisfy the Court that he is "a completely reformed character" (Ex parte Wilcocks 1920 TPD 243 at 245) and that his "reformation or rehabilitation is, in all the known circumstances, of a permanent nature" (Ex parte Knox 1962(1) SA 778 (N) at 784). The very stringency of the test for re-admission is an index to the degree of gravity of the misconduct which gave rise to disbarment. "

Page 5 of 120071 JOL 22426 (SCA) (Incorporated Law Society, Natal v Roux 1972 (3) SA 146 (N) at 1508-E quoted with approval in *Cirota v Law Society Transvaal* 1979

- (1) SA 172 (A) at 1948-D.) It is seldom, if ever, that a mere suspension from practice for a given period in itself will transform a person who is unfit to practise into one who is fit to practise. Accordingly, as was noted in *A v Law Society of the Cape of Good Hope* 1989
- (1) SA 849 (A) at 852E-G, it is implicit in the Act that any order of suspension must be conditional upon the cause of unfitness being removed. For example, if an attorney is found to be unfit of continuing to practise because of an inability to keep proper books, the conditions

of suspension must be such as to deal with the inability. Otherwise the unfit person will return to practice after the period of

suspension with the same inability or disability. In other words, the fact that a period of suspension of say 5 years would be a sufficient penalty for the misconduct does not mean that the order of suspension should be 5 years. It could be more to cater for rehabilitation or, if the court is not satisfied that the suspension will rehabilitate the attorney, the court ought to strike him

from the roll. An attorney who is the subject of striking application and who wishes a court to consider this lesser option, ought to place the court in the position of formulating appropriate conditions of suspension.

[9] Third, the exercise of this discretion is not bound by rules, and precedents consequently have a limited value. All they do is to indicate how other courts have exercised their discretion in the circumstances of a particular case. Facts are never identical, and the exercise of a discretion need not be the same in similar cases. If a court were bound to follow a precedent in the exercise of its discretion it would mean that the court has no real discretion. (See *Naylor v Jansen* 2007

(1) SA 16 (SCA) at paragraph 21.)"

[25] As shown in the applicant's papers, respondent has practised for a period of at least 3 (three) years without submitting his audit reports; has practiced without a Fidelity Certificate; his conduct has fallen short of the required standard in his handling of the Mervor case; absented himself from a disciplinary enquiry instituted by the applicant to enquire into his alleged remiss conduct; he has not proffered a semblance of explanation for his apparent failures under the Rules whose contravention he was answerable for; above all, he did not file any opposition and affidavit in answer to the application against him.

[26] The third enquiry consists in an appropriate disciplinary outcome, accepting that respondent's unprofessional conduct inter alia, does not mean that his removal in relation to the third enquiry, the fact that respondent acted unprofessionally does not lead to his automatic removal.

[27] To sum up, the determination is consequently that the offending conduct has been established on a balance of probabilities.

[28] The applicant has called into question respondent's reprehensible conduct which was found to be unprofessional, dishonourable and unworthy, and that he cannot be considered to be a fit and proper person to remain on the roll of attorneys. Having considered all the facts on whose basis I am entitled to exercise a discretion, I am in respectful agreement with the applicant as substantiated by such facts.

SANCTION

[29] In my exercise of a value judgment required for the imposition of an appropriate sanction, I take into account that the unchallenged transgressions are numerous and extend over a period of time.

[30] I am of the view that an order striking off the respondent is appropriate order.

COSTS

[31] It is ordered that the respondent must pay the costs of the application on the tariff as between attorney and client.

ORDER

[32] In the result, I make the following order:-

- a) That Jo Francois Spies is removed from the roll of attorneys and the applicant is ordered to adjust its records accordingly;
- b) That he surrenders and delivers his certificate of enrolment as an attorney to the registrar of this Honourable Court;
- c) In the event the respondent fails to comply with the terms of the order in the preceding paragraph 'b', within two weeks from the date of this order, the sheriff of the district in which the certificate is, be authorised and directed to take possession of the certificate, and to hand it over to the registrar of this Honourable Court;
- d) The respondent is prohibited from handling or operating on his trust accounts;
- e) Johan Van Staden, the director of the Gauteng Office of the applicant (or his successor as such) be appointed as curator bonis (curator) to administer and control the trust accounts of the respondent, including accounts relating to insolvent and deceased estates and any estate under curatorship connected with the respondent's practise as an attorney and including, also the separate banking accounts opened and kept by respondent at a bank in the Republic of South Africa in terms of section 86 (I) and
- (2) of Act 28 of 2014 and or any separate or interest bearing accounts as contemplated by sec 86(3) or sec 86 (4) of Act 28 of 2014.
- f) Respondent shall comply with all orders as per draft order which was made an order of court on the date of the hearing of this application, being the 30 August 2022.

A Mpofu

Acting Judge of the High Court

Gauteng Division

Pretoria

I agree, it so ordered

JS Nyathi

Judge of the High Court

LEGAL REPRESENTATIONS

For the Appellants: Mr

Dawid Smith

Instructed by: : Mothle

Jooma Sabdia Inc

Nadinevs@mjs-inc.co.za

For the Respondent: No

appearance

Instructed by: N/A

Heard on:

30 August 2022

Judgement

handed down on: 16 September 2022

[1]

[2008] JOL 22426 (SCA)

[2] Ibid Malan at paragraph 5 to 9

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