

SOUTH AFRICA / JUDGMENT

M.DV v C.DV (521/2022) [2023] ZALMPPHC 28 (5 June 2023)

[2023] ZALMPPHC 28**COURT**

Limpopo High Court, Polokwane

BEFORE

SS Mthimkulu

CASE / FILE NUMBER

521/2022

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Policy**REPUBLIC OF SOUTH AFRICA****IN THE HIGH COURT OF SOUTH AFRICA****LIMPOPO DIVISION, POLOKWANE****Case Number: 521/2022****REPORTABLE: NO****OF****INTEREST TO OTHER JUDGES: NO****REVISED:****NO****Date:5/6/2023****In the matter between:****M.DV****APPLICANT****And****C.DV****RESPONDENT**

JUDGMENT

MTHIMKULU SS AJ:

Introduction

[1] The parties before court are married to each other and there are currently divorce proceedings pending between them. The applicant is and has always been represented by Bosman Attorneys in the divorce proceedings. The respondent is represented by DDKK Inc. Ms. Visagie, an attorney by profession and was in the employ of Bosman Attorneys, and assisted in the divorce matter concerning the applicant. On or about July 2022, Ms. Visagie left the employ of Bosman Attorneys and took up employment as an attorney with DDKK Inc.

[2] The applicant in this application seeks a declaratory order in the following terms;

- (a) That DDKK Inc., being the attorneys of record acting on behalf of the respondent, be declared to have a conflict of interest in the matter (to wit, the divorce matter).
- (b) That DDKK Inc., be barred from acting as attorneys of record in this matter.
- (c) That the respondent, alternatively DDKK Inc. be ordered to pay the costs of this application.

[3] It is common cause between the parties that Ms. Visagie was in the employ of Bosman Attorneys as an attorney and whilst so employed,

dealt with the divorce matter pertaining to the parties. It also common cause that she obtained confidential information from the

applicant, while employed at Bosman Attorneys.

[4] What is in dispute in this application is whether Ms. Visagie, who is now in the employ of DDKK Inc., will have a conflict of interest in the matter. The main issue for determination, is whether an attorney who obtained confidential knowledge from one party while acting as his attorney, should be allowed to act on behalf of the opposition party, relating to the same matter. The applicant further raises the issue of whether the attorneys acting on behalf of the respondent can in fact act as such.

Conflict of interest:

[5] In its application the applicant makes the following submissions:

- (a) That DDKK Inc. has a conflict of interest in the divorce matter because it employed Ms. Visagie as a practising attorney in its firm, while she had received confidential knowledge or information about the affairs of the applicant when she was employed at Bosman Attorneys.

- (b) That the conduct by DDKK Inc. is prohibited in terms of the Legal Practice Council's code of conduct.
- (c) That DDKK Inc. does not dispute that Ms. Visagie has information relating to the matter but states that she will not divulge any of the information relating to the divorce matter or any other matter she became privy to whilst she was employed at Bosman Attorneys.
- [6] The court was referred to the Legal Practice Act^[1] which governs the conduct of legal practitioners and regulates the legal profession, in the public interest, by means of a single statute. The argument by the applicant, which argument this court accepts as correct, is that failure to adhere to this conduct by legal practitioners or by law firms constitutes misconduct.
- [7] Section 36(1) of the Legal Practice Act provides that the Council must develop a code of conduct that applies to all legal practitioners and all candidate legal practitioners and may review and amend such code of conduct.
- [8] In opposing this application, the respondent made the following

submissions:

- (a) That section 63.1.1 of the code of conduct states ".....the legal practitioner may not act in any proceedings in which the prejudiced client is a party."
- (b) That the interpretation of "legal practitioner" should not be understood to mean the entire "firm of attorneys". That an entire firm of attorneys cannot be barred from acting against a former client of a legal practitioner, tainted with privileged information, who has joined the firm.
- (c) The respondent further submits that if the legal practitioner dealing with a matter is not the legal practitioner with the privileged

information, there can be no possibility or probability of a conflict of interest.

- (d) A compelling argument is advanced by the respondent that it is unreasonable and unrealistic to expect that a firm, after having

employed a new attorney will have to withdraw as attorneys of record for all the matters where it is the opposing party, just because the new employee was involved in certain matters or was employed by the opposing party's firm. To allow this would unreasonably limit the firm as well as the clients' rights with regards to legal representation and choosing their preferred legal representatives.

- [9] The respondent further argued that since the applicant is seeking a final interdict, he has failed to prove that he will suffer injury if the said order is not granted by this court.
- [10] From the afore-going it is apparent that the relief sought by the applicant is a final interdict. The requirements for a final interdict are trite. These are:

- (a) A clear right;
- (b) an injury actually committed or reasonably apprehended; and
- (c) the absence of similar protection by any other ordinary remedy.[2]

[11] As indicated earlier, one of the elements of the right foundational to the relief sought by the applicant is that Ms. Visagie received

confidential information pertaining to the divorce matter concerning the applicant, whilst she was employed at Bosman Attorneys. The respondent does not dispute that Ms. Visagie received confidential information during her tenure as an attorney at Bosman Attorneys. The respondent however contends that, Ms. Visagie, has not discussed the case in question with the person dealing with the matter at the firm and has given her assurance that she will refrain from doing so.

[12] Furthermore, that she gave an undertaking in a letter sent to the applicant's attorney of record prior to the application being brought to not discuss matters in which her erstwhile employer was involved in, with the attorneys of the respondent.

[13] The applicant seeks to suggest in its submissions that the term "legal practitioner" should be interpreted widely and be understood to mean an entire "firm of attorneys" and therefore the firm of attorneys being DDKK Inc., cannot act against a former client of a legal practitioner, tainted with privileged information, who has joined the firm.

Is there injury or reasonable apprehension of injury proved?

[14] The applicant contends that when Ms. Visagie is at DDKK Inc. information is being passed within the firm. This contention by the applicant is not substantiated by any tangible evidence to the effect that information is being passed within the firm, especially with regards to this matter. In fact, the applicant's case is framed in broad terms and it is difficult to discern from the papers what information is referred to as being passed within the firm and to then assess whether such information is indeed confidential.

[15] The applicant also does not make out a case to convince the court that Ms. Visagie discussed the divorce with the person assigned to deal with the matter at DDKK Inc. The contention that when Ms. Visagie is at the firm, information is being passed within the firm is a mere perception. The applicant's apprehension of suffering harm remains unsubstantiated. A mere perception or probability is not enough to restrain a firm from representing a client, especially if the legal practitioner within the firm dealing with the matter is not privy to the privileged information that may be detrimental to the opposing client's case.

- [16] Moreover, the applicant in its application does not address an important factor which requires consideration, relating to the client's right to choose a law firm of her preference. Neither does the applicant address the absurdity that would occur if a law firm, after employing a new attorney, would have to withdraw as attorneys of record for all the matters, where it is the opposing party because the new employee was involved in some of the matters or was employed by the opposing party's firm.
- [17] I am not satisfied that a proper case has been made out for the order sought.
- [18] It is regrettable that the order sought is against DDKK Inc. but the applicant in this application elected not to cite DDKK Inc. as a party to these proceedings. The relief sought by the applicant is flawed and has no solid foundation in law.

Conclusion:

- [19] The applicant has failed to make out a case for the relief sought, and consequently the application falls to be dismissed.

Order:

- [20] The application is dismissed with costs, which include costs of counsel.

SS MTHIMKULU

ACTING JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 16h00pm on 05 June 2023.

DATE OF HEARING: 05/22/23 DATE JUDGMENT DELIVERED: 06/05/23 APPEARANCES: Attorney for the Applicant: Bosman Attorneys Counsel for the Applicant: Mr Bosman fourie@bosmanattorneys.com Attorney for the First Respondent: DDKK Attorneys Counsel for the First Respondent: Advocate S S Green mdk@ddkk.co.za

- [1] 28 of 2014.

- [2] S[...] v S[...] 1914 AD 221 at 227.

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