

SOUTH AFRICA / JUDGMENT

South African Legal Practice Council v Mphanama (9875/2022) [2022] ZALMPPHC 70 (13 December 2022) [2022] ZALMPPHC 70

COURT

Limpopo High Court, Polokwane

BEFORE

E M Makgoba, M G Phatudi

CASE / FILE NUMBER

9875/2022

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION,

POLOKWANE)

CASE

NO: 9875/2022

REPORTABLE:

YES/NO

OF

INTEREST TO THE JUDGES: YES/NO

REVISED.

In the matter between:

THE SOUTH AFRICAN

LEGAL PRACTICE

APPLICANT

COUNCIL

and

AZWIFANELI GEORGE

MPHANAMA

RESPONDENT

JUDGMENT**MAKGOBA JP**

- [1] This is an application for the removal of the Respondent from the roll of practicing advocates and for an order to prohibit him from practising as such.

The application is brought in terms of the Legal Practice Act 28 of 2014 (“LPA”) the Code of Conduct developed in terms of section 36 of the LPA and the Regulations made in terms of section 109 (1)(a) of the LPA.

The application is opposed by the Respondent.

- [2] The Applicant is the South African Legal Practice Council, a national statutory body established in terms of section 4 of the LPA.

The Legal Practice Council and its Provincial Councils regulate the affairs of and exercise jurisdiction over all legal practitioners (attorneys and advocates) and candidate legal practitioners.

- [3] The Respondent is a legal practitioner, duly admitted as an advocate on 17 September 1998 and therefore falls under the jurisdiction of the Applicant in terms of regulation 5(1) of the Regulations issued under section 109 (1)(a) of the LPA.

- [4] Prior to instituting the present proceedings the Applicant did not subject the Respondent to any disciplinary proceedings but it approached this Court on the basis that the Respondent has been convicted of fraud, hence he is not a fit and proper person to continue practising as an advocate.

- [5] The right of the Legal Practice Council (“the LPC”) to approach the Court for relief as sought in the present application before us does not depend on its prior holding of a disciplinary enquiry against the legal practitioner concerned.

The Court has inherent powers to hear the application for suspension or striking off a legal practitioner’s name from the roll of legal practitioners irrespective of whether or not disciplinary steps have been taken against a legal practitioner by the LPC.[1]

- [6] The respondent legal practitioner has no right to insist upon a disciplinary enquiry being held prior to steps being taken for his removal from the Roll of legal practitioners. In fact, the Court can mero motu initiate steps to strike a legal practitioner’s name off the Roll of legal practitioners.[2]

- [7] The factual matrix giving rise to the present application is common cause or not seriously disputed.

- [8] The Respondent was admitted as a non-practising advocate on 17 September 1998 while employed by the Department of Justice as a Magistrate.

On 30 May 2017, the Respondent was convicted in this Court (Muller J) of four counts of fraud and sentenced to 18 (Eighteen) months imprisonment, the whole of which was suspended on conditions that:

8.1. he repays the amount of R 3638.95 to the Registrar; and

8.2. he is not convicted of an offence involving an element of dishonesty, which conviction he would be sentenced to imprisonment without an option of a fine.

[9] Furthermore, the Respondent was convicted of defeating or obstructing the course of justice and sentenced to 6 (six) months imprisonment or a fine of R 12 000.00.

He appealed to the Supreme Court of Appeal (“SCA”) against his conviction and sentences.

The SCA dismissed his appeal against the conviction and sentence on the fraud charges and upheld his conviction and sentence on the charge of defeating or obstructing the course of justice.

[10] The Respondent’s conviction for fraud, giving rise to the complaint in the present proceedings, arose from the time he was employed as a Magistrate by the Department of Justice and was still a non-practising advocate.

The nature of the fraud was that the Respondent made a fraudulent misrepresentation in respect of a motor vehicle he used for official trips. He misrepresented to his Sub Regional Head that he was using a RAV 4 motor vehicle with a larger engine capacity whereas he no longer had such motor vehicle.

The motor vehicle he was using was a 2.0-liter sedan which would entitle him to claim a smaller amount of reimbursement or compensation for his official trips.

An amount of R 3638.95 was paid to him, which amount was not due and payable to him.

Hence he was ordered to repay the said amount upon conviction on the charge of fraud.

[11] Counsel for the Applicant, Mr. Moolman submitted that the conduct of the Respondent can at best be described as fraudulent and that he is not fit and proper to act as an advocate. That, due to the high ethical standard set by the legal profession, it cannot be allowed that any person who is convicted of a fraudulent act just be allowed to continue practising without any sanction.

Counsel argued that a striking from the roll is clearly the right remedy, but in the alternative, Counsel suggested that a suspension might also be considered by the Court.

[12] Counsel for the Respondent, Mr. Monene argued that the conduct complained of took place between December 2008 and March 2009, about 13 to 14 years ago and it has not been repetitive. That, 13 years was sufficient time for the Respondent’s rehabilitation and re-enrolment as a legal practitioner had these proceedings been brought at the time of the misconduct.

Counsel argued further that even if it could be established that the Respondent remains a person who is not fit and proper, an order for a struck off, would be disproportionate and not a judiciously exercised discretion of this Court.

[13] It is now settled law that an application for the removal from the roll or suspension from practice, of a legal practitioner involves a three stage enquiry.[3]

First, the Court has to determine whether the alleged offending conduct has been established on a balance of probabilities. This is a factual enquiry.

Second, consideration must be given to the question whether, in the discretion of the Court, the person concerned is not “a fit and proper person to continue practice as an attorney/advocate”.

This involves a weighing up of the conduct complained of against the conduct expected of an attorney or advocate and is a value

judgment.

Third, the Court is required to consider whether, in the light of all the circumstances, the name of the attorney or advocate concerned should be removed from the roll of legal practitioners, or whether an order suspending him or her from practice would suffice.[4]

[14] The question whether a legal practitioner is no longer a fit and proper person to practice as such lies in the discretion of the Court. The appropriate sanction, namely a suspension from practice or striking from the roll, also lies within the discretion of the Court.[5]

[15] Usually when the Court imposes a sanction of striking from the roll or suspension from legal practice, the aim is to protect the public against the possible repetitive misconduct of a legal practitioner.

Bearing this in mind, the following two issues need to be kept in mind when an appropriate sanction is to be imposed in the present case:

15.1. Whether the Respondent’s conduct as outlined in paragraphs 8, 9 and 10 above, will cause immeasurable damage to the reputation of the legal profession and the Courts; and

15.2. Whether there is a real possibility that other members of the public or even clients of the Respondent will be severely prejudiced by the Respondent’s conduct.

[16] In his answering affidavit the Respondent does not seek to justify his conduct and/or deny the seriousness thereof. To the contrary he acknowledges his conduct and indicates that he has a rehabilitation programme to give back to the community and whilst grabbing the opportunity to grow and promote ethical behavior.[6] He has taken the liberty to volunteer as the Chairperson of the South African Football Association (“SAFA”) Vhembe Region, where he presides over disciplinary hearings of its members.

[17] For reasons that follow hereunder, we are of the view that even if it is established that the Respondent is considered a person who is not fit and proper, an order for a struck off or an outright suspension from practice would be disproportionate.

The following reasons are taken into consideration:

17.1. It is now 13 to 14 years after the commission of the misconduct;

17.2. The amount he was convicted for, being R 3638.95 is relatively negligible and he has repaid it as ordered by the Criminal Court;

17.3. Instead of sentencing him to direct imprisonment, that Court suspended the sentence on condition that he repays the money. Logically, this Court is at liberty to consider suspension of the sanction to be imposed on the Respondent;

17.4. The Respondent currently volunteers as a Chairperson of a disciplinary committee of SAFA as a mode of rehabilitation and growth;

17.5. The Respondent is currently employed as a part-time lecturer at the University of Venda Law Faculty. An order for a struck off may have adverse consequences on his appointment as such;

17.6. The Respondent is not actively involved in legal practice in the sense that he does not operate a trust account that would expose him to misconduct to the prejudice of members of the public. The chances of him repeating a fraudulent conduct is quite remote; and

17.7. Counsel for the Applicant conceded during argument and in his heads of argument that an order of suspension would still be adequate in the circumstances.

[18] In the result the following order is granted:

1. The Respondent is suspended from legal practice for a period of 6 (Six) months;
2. The order of suspension in 1 above, is wholly suspended for a period of 12 (Twelve) months on condition the Respondent is not found guilty of an offence or misconduct involving an element of dishonesty; and
3. The Respondent is to pay the costs of the application on party and party scale.

E M MAKGOBA

JUDGE PRESIDENT OF THE HIGH

COURT, LIMPOPO DIVISION

I agree,

M G PHATUDI

JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on

: 09 December 2022

Judgment delivered on : 13 December 2022

For the Applicant : JF Moolman

: Pratt Luyt & De Lange Attorneys

For the Respondent : Adv M S Monene

Adv C T Malatji

Instructed by

: Sigwavhulimu Inc. Attorneys

[1] The Law Society of the Northern Provinces v Morobadi (1151/2017)

[2018] ZASCA 185 (11 December 2018) at para [25].

[2] The Law Society of the Northern Provinces v Bothma and Another (33739/2016)

[2019] ZAGPPHC 383 (5 September 2019) at paragraph [8].

[3] Malan & Another v Law Society of the Northern Provinces [2008] ZASCA 90; 2009 (1) SA 216 (SCA) at paragraphs 4 to 8.

[4] See Summerly v Law Society of the Northern Provinces [2006] ZASCA 59; 2006 (5) SA 613 (SCA) paragraph 2 and the cases there cited.

[5] Jasat v Natal Law Society 2000

(3) SA 44 (SCA) at 51 B – I.

[6] Answering Affidavit, page 4 paragraph 11, on page 72 of the paginated papers.

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