

SOUTH AFRICA / JUDGMENT

Zilwa and Another v South African Legal Practice Council (7367/2021) [2021] ZAGPPHC 870 (8 November 2021) [2021] ZAGPPHC 870

COURT

North Gauteng High Court, Pretoria

BEFORE

Noncembu, Basson

CASE / FILE NUMBER

7367/2021

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 7367/2021

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

8/11/2021

In the matter between

SIVUYILE SANDILE ZILWA

First Applicant

ZILWA (GAUTENG) INCORPORATED ATTORNEYS

(Registration number 2004/004277/21)

Second Applicant

and

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL

Respondent

APPLICATION FOR LEAVE TO APPEAL

Noncembu AJ

- [1] This is an application for leave to appeal to the Supreme Court of Appeal (SCA) against the judgment of this Court striking the first applicant from the Roll of Practitioners, Notaries and Conveyancers of this Court[1]; which judgment was handed down electronically on the 28 July 2021.

The test for leave to appeal

- [2] Section 17 of the Superior Court's Act [2] regulates an application for leave to appeal from a decision of the High Court. It provides as follows; -

"17. Leave to appeal -

- (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that -
- (a)
- (i) the appeal would have reasonable prospects of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) The decision sought on appeal does not fall within the ambit of section 16(2) (a); and
- (c) Where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."
- [3] Prior to the Superior Court's Act the test in an application for leave to appeal was whether there were reasonable prospects that another court might come to a different conclusion. Section 17(1) has raised the bar in this regard, and as Bertelsmann J, held in *Mont Chevaux Trust v Tina Goosen and 18 Others*[3]: -

'It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cornwright & Others* 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.'

Grounds for leave to appeal

- [4] I do not intend to deal with each of the grounds of appeal raised separately, suffice it to say that in essence the first applicant has not raised grounds other than those in the hearing of the matter, which issues were dealt with extensively in the written reasons for judgment. One of the main grounds raised is that this Court failed to determine that the applicant's misconduct was established on a balance of probabilities. There is no merit in this argument. This Court concluded with reference to, inter alia, the first applicant's version

and admissions, that misconduct was indeed established on a balance of probabilities. With reference to the admissions made by the first applicant, the Court concluded that on at least two occasions there was a deficit in the firm's trust account and that, to make up for the deficit, the first applicant borrowed monies from two of the firm's clients who were also the firm's trust creditors. This conduct, this Court held, was an abuse of his trust position which on its own amounted to misconduct.

- [5] Furthermore, the first applicant admitted that the firm's trust account was mismanaged; that it was not managed according to the Legal Practice Council's Rules (LPG); and that the first applicant did not run the firm's trust account but acted on instructions of his financial manager and conveyancing secretary, which conduct, this Court found, is contrary to Rule 54.19 of the LPC's Rules.
- [6] The first applicant also took issue with the fact that he was not afforded an opportunity to engage with Mr Reddy's investigation report and that he was not afforded a disciplinary hearing that preceded this application to remove his name from the roll of legal practitioners. Regarding the first complaint. The first applicant dealt with the issues raised in the Reddy report in his answering affidavit (and his supplementary affidavit) and it was the applicant himself who admitted that he could not pay Mr Sibeko because his firm's trust was in a deficit.
- [7] Also, some of the complaints against the first applicant date as far back as 2018. Nothing had prevented the first applicant from investigating the complaints at the time he became aware of these complaints. Also, the first applicant was aware of what was happening in his trust account and for that reason he transferred large amounts of money into his firm's trust banking account to reduce the deficit. To now claim that he did not have sufficient time to deal with the allegations against him is simply disingenuous.
- [8] It is further instructive that the first applicant fails to deal with the complaint in respect of the deceased estate of the late Ms Nteo. This is instructive as this complaint on its own is serious enough to strike the first applicant from the roll of practicing attorneys.
- [9] Regarding the complaint that the disciplinary hearing should have been held. The judgment dealt with this issue in some detail with reference to case law. The first applicant insists that it ought to have conducted a disciplinary hearing first. The court considered these submissions in its judgment but concluded that the egregious nature of the impugned conduct warranted this Court to entertain the application.
- [10] The above are but some of the considerations which led this Court to conclude that the misconduct of the first applicant was established on a balance of probabilities.

- [11] The first applicant further contended in his submissions that his counsel was not given an opportunity to address this Court on the aspect of his removal. The basis for the submission is that, according to him, the Court had stated that it had a mind to suspend him from practice because a// the evidence relevant to the alleged misconduct was not yet before Court and was still being investigated.
- [12] This submission is without merit and misconstrues the questioning of the parties by this Court. What was pointed out during argument was that there were clear red flags on the evidence presented and that prima facie, at the very least, a suspension was warranted. These comments in no way fettered this Court's discretion to decide on an appropriate sanction taking into account all the facts. Also, if regard is had to paragraphs [45] - [51] of the judgment, it should be clear to the first applicant why the Court was of the view that an order striking the first applicant's name is appropriate in the circumstances. The Court arrived at this decision taking into account the egregious conduct of the first applicant and the Court's concern for the need to protect the public against attorneys such as the first applicant.
- [13] The first applicant also criticises the reference by this Court to decision in *The Law Society of the Northern Provinces v Morobad*[4] on the interpretation of section 22 (1) of the Attorney's Act. Whilst it is correctly pointed that the current matter does not deal with section 22 (1) of the Attorney's Act, reference to the aforementioned case pertained to the legal principle therein which is equally applicable to the present matter. It can therefore not be said that this Court misdirected itself.
- [14] In my view after careful consideration of the first applicant's stated grounds for leave to appeal and the written submissions made by both parties, there is nothing that persuades me that any appeal would have reasonable prospects of success.
- [15] There are no other compelling reasons why leave to appeal should be granted in this matter.
- [16] Therefore, I make the following order:
- [16.1] The application for leave to appeal is dismissed with costs.

NONCEMBU A.J

Acting Judge of the High Court

Gauteng Division

I agree

BASSON.J

Judge of the High Court

[1] As well as ancillary orders pursuant thereto.

[2] Act 10 of 2013.

[3] 2014 JDR 2325 (LCC) at para 6 (3 November 2014).

[4] (1151/2017) [2018] 185 (11 December 2018).

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Prepared on 11 October 2026 · Esheria