REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2012/29828

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

21/01/2015
DATE

SIGNATURE

In the matter between:

JOHANNESBURG SOCIETY OF ADVOCATES Applicant

and

RICHARD JAN MOERMAN VAN BLANKENBERG Respondent

J U D G M E N T

VICTOR, J:

[1] The applicant in this matter seeks the striking off of the respondent from the Roll of Advocates. The respondent who has practised as an

advocate for the past 27 years was formerly a member of the Johannesburg Bar Council and an honorary secretary to the Bar Council. He resigned as a member of the applicant and has practised independently for the last three years.

[2] The striking off sought by the applicant is in terms of section 7(1)(d) read together with section 7(2) of the Admission of Advocates Act, No 74 of 1964.

Section 7 of the Admission of Advocates Act provides as follows:

> "*(1) Subject to the provisions of any other law, a Court of any division may, upon application, suspend any person from practice as an advocate or order that the name of any person be struck off the roll of advocates –*
>
> ...
>
> *(d) if the Court is satisfied that he is not a fit and proper person to continue to practice as an advocate;*
>
> ...
>
> *(2) ... an application under paragraph (a), (b), (c) or (d) of subsection (1) for the suspension of any person from practice as an advocate or for the striking off of the name of any person from the roll of advocates may be made by the General Council of the Bar of South Africa or by the Bar Council or the Society of Advocates.*"

[3] The nub of this matter is the issue of a certificate by the respondent in his capacity as an advocate for the purposes of proceedings in Belgium. It is necessary to determine whether the certificate prepared by the respondent

was inaccurate due to a bona fide error on his part or whether the certificate amounted to a deliberate falsity. It was common cause that the certificate as worded by the respondent was at variance with the contents of a court order granted ex parte in this division.

The certificate

[4] The certificate was issued pursuant to an ex parte urgent application where Sutherland J issued a rule nisi calling upon a litigant, the mother of the minor child, to show cause on 19 January 2010 why she should not be arrested for violating a court order granted by Mathopo J for removing the minor child beyond the borders of the Republic of South Africa. The mother had inter alia breached the court order by taking the child to Belgium. The respondent had settled the ex parte application and was fully conversant with the matter.

[5] The certificate was dated 3 December 2009 and was required for urgent legal proceedings in Belgium for the return of the child to South Africa. The contents of this certificate are as follows: The respondent states that he is an advocate of the High Court of South Africa; that he has been in practice for 23 years; that he was the advocate in the litigation between two parties and that this Court had jurisdiction over the litigation in terms of the Hague Convention. He states further that on 25 November 2009 his client had discovered that the minor child of the litigating parties was removed from the Republic of South Africa. An urgent application was launched and an order was granted for the return of the minor child. He also advised in the certificate

that a notice of motion, a draft order and affidavits were prepared during the course of 26 November 2009. He attached the notice of motion, the draft order and founding affidavit to the certificate and the Rule Nisi granted by His Lordship Mr Justice Sutherland on Friday morning 27 November 10h00. He confirmed that the court order was granted for the immediate return of the minor child.

[6] The offending part of the certificate is in paragraph 9 which goes on to interpret the Rule Nisi as follows:

> "9. *The Order serves as a binding Order and is fully and immediately enforceable and compels the Return of X to Y in the Republic of South Africa, the surrender of X's passport to Y two* (sic) *immediate Orders for the Arrest of Z. Should Z choose to return to the Republic of South Africa she will immediately be arrested to answer to the Order and she is called upon to do so on the 19th January 2010.*"
>
> (in order to protect the minor child's identity I have omitted the parties names from the quotation)

[7] The applicant submits that the only portion of the order which was enforceable was that Z had to show cause and of course that there would be no arrest. On 24 February 2010 Saders Attorneys brought to the attention of the respondent's attorneys that there was no order for the immediate arrest of Z since the order was a rule *nisi* returnable on 19 January 2010 and called for an explanation from the respondent. The following day the respondent's then attorney responded and stated that the letter would be forwarded to him. The respondent disputes receiving the letter on that day. Mr Sader called for an

explanation in regard to the respondent's interpretation and explanation of the court order. On 19 March 2010 Mr Sader notes in a letter that the respondent's comments regarding paragraph 9 of the certificate had not been received. This letter is followed up on 7 April 2010 with a further letter that no explanation regarding the certificate had been received. The next day being 8 April 2010 the respondent forwarded an explanation to his instructing attorney.

[8] The explanation proffered by the respondent was to the effect that Z would not have "satisfied the evidential onus regarding wilfulness and mala fides" and that "the prima facie contempt would have been shown beyond reasonable doubt and the order for her contempt would have been confirmed" He also expressed regret that the certificate did not reflect this detail. He also states that "no malice or misrepresentation was intended".

[9] This explanation was not accepted by Mr Sader and the complaint was referred to the applicant. On 18 May 2010 the respondent provided an explanation to the applicant. He stated that he prepared the certificate on an urgent basis as the legitimacy of the rule *nisi* had been challenged in Belgium. He adopted the view that the opposing litigant would not have been able to discharge the *onus* and that she would have been committed for contempt of the court order. He regrets that the certificate does not reflect the necessary detail and that he did not intend malice nor did he misrepresent the situation. He also noted that he had not been a member of the Johannesburg Bar for some three years.

[10] The explanation goes on to set out the background and states that paragraph 9 of the certificate was clumsily worded. He expresses his regret and that no malice or misrepresentation was intended. He also stated that he prepared the certificate in haste meaning a matter of hours. He explains that the offending paragraph was clumsily and erroneously worded and that there was no sinister intent in the poor choice of words. He expressed his apology to the opposing party; the opposing party's attorney Mr Sader and the litigant. The respondent's apologetic stance was once again emphasised by him. By 31 August 2010 in a further letter to the Professional Sub-Committee the respondent reiterated that the certificate was erroneously worded and again expressed his apology. The certificate was for the attention of the Belgium attorney. It was not used in a Belgium court or in court papers or judgments. There is an affidavit from counsel in Belgium to the effect that no reliance was placed on the certificate in the litigation in Belgium and again he apologised.

[11] The applicant took the view that the explanation did not exonerate the respondent; that his explanation was incompatible with honesty on his part and that there was a variance between the first and second response and the delay in providing an explanation to the opposing attorney justified his striking off. They rejected the respondent's attempt to exonerate himself from the content of paragraph 9 of the certificate by referring to the compendium of documents that were attached to the certificate which clearly shows that paragraph 9 of the certificate was incorrectly worded. In other words the

respondent claimed that the very documents attached to the certificate showed that clause 9 was incorrectly worded.

[12] Those documents consist of a letter dispatched by the respondent's instructing attorneys to the Belgium attorney; a memorandum prepared by the respondent and addressed to his instructing attorneys and the certificate of confirmation of 3 December 2009. In other words the attached documents had no reference to the immediate arrest of Z who had travelled to Belgium.

[13] The applicant did not accept that the certificate was a patent error on his part and rejected the notion that nothing could be gained from the incorrect wording and that there was no deliberate conduct on the part of the respondent. The applicant also rejected the explanation that the situation of urgency prevailing at the time led to the error.

Alleged variance of respondent's explanations

[14] The applicant contends that on two separate occasions the respondent sought to provide an explanation and that these two explanations were at variance. A proper analysis of the averments are important as it goes to the heart of evaluating whether the respondent is a fit and proper person to practice as an advocate and what the consequence should be. The first explanation referred to above was that he believed in his view that Z would not be able to discharge the onus to prevent her committal to prison.

[15] The second explanation is as follows –

'regarding the reference in paragraph 9 of the certificate, to the "immediacy" of the orders for arrest, and as stated in my letter of April 8th, I sincerely regret that such reference is clumsily worded.." and

"I disagree with Mr Sader that paragraph 9 of the certificate contains "false" representations. I concede that, in haste, part of paragraph 9 was clumsily and erroneously worded. However to state that that misrepresentation regarding the immediacy of effect of warrants of arrests is "false" is unfounded and injurious"

[16] It is the applicant's case that the two explanations are at variance with each other. In my view the respondent in the second explanation is trying to ward off the allegation that he had committed a misrepresentation and is not trying to provide a different explanation. He is attempting to explain that he did not deliberately and intentionally mislead. A false representation involves that a fact must be presented in the knowledge that it is false or without any genuine belief in its truth. The respondent has consistently denied that he intended a falsity. No evidence was led in this matter and thus there was no cross-examination on this aspect of a false representation which could more properly have been determined rather than by way of affidavit. A court should be slow to accept proof of a falsity on affidavit where there is a plausible explanation. The second aspect of the applicant's concern namely that the respondent should have admitted that the certificate amounted to a false

representation was an exacerbating factor is a feature which in my view relates to the appropriate censure and does not amount to proving he is not a fit and proper person to practice as an advocate.

The Law

[18] In *General Council of the Bar of South Africa v Geach and Others* 2013 (2) SA 52 (SCA) para [50] confirms that in terms of s 7(1)(d) of the Admission of Advocates Act 74 of 1964 a court may suspend any person from practice as an advocate or to order that his or her name be struck off the roll of advocates 'if the court is satisfied that he [or she] is not a fit and proper person to continue to practise as an advocate'.

[19] It is trite that there are three steps in the enquiry as to whether an advocate must be struck off. The principles set out in *Malan and Another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) were confirmed in *Geach supra* which in turn made a comparison with the Attorneys Act 53 of 1979, relying on *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) at pg 51

> 'First, the Court must decide whether the alleged offending conduct has been established on a preponderance of probabilities. (See, for example, Nyembezi v Law Society, Natal 1981 (2) SA 752 (A) at 756H - 758A where the Court was concerned with the equivalent section in the now repealed Attorneys, Notaries and Conveyancers Admission Act 23 of 1934; see also Kekana v Society of Advocates of South Africa 1998 (4) SA 649 (SCA) at 654D in relation to s 7 of the Admission of Advocates Act 74 of 1964.) The second inquiry is whether, as stated in s 22(1)(d), the person concerned 'in the discretion of the Court' is not a fit and proper person to continue to practise. The words italicised were inserted in 1984 (see Law Society of the Cape of Good Hope v C 1986 (1) SA 616 (A) at 637B - C). It would seem clear, however, that, in the context of the section, the exercise of the discretion referred to involves in reality a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, a value judgment. The discretion is that of the Court of first instance. It is well

established that a Court of appeal has a limited power to interfere and will only do so on well recognised grounds, viz where the Court of first instance arrived at its conclusion capriciously, or upon wrong principle, or where it has not brought its unbiased judgment to bear on the question or where it has not acted for substantial reasons (Law Society of the Cape of Good Hope v C (supra at 637D - H); Reyneke v Wetsgenootskap van die Kaap die Goeie Hoop (supra at 369E - G); Vassen v Law Society of the Cape of Good Hope 1998 (4) SA 532 (SCA) at 537D - G). The third inquiry is whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order suspending him from practice for a specified period will suffice. This is similarly a matter for the discretion of the Court of first instance and the power of a Court of appeal to interfere is likewise limited. Whether a Court will adopt the one course or the other will depend 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 (Incorporated Law Society, Transvaal v Mandela 1954 (3) SA 102 (T) at 108D - E), the likelihood or otherwise of a repetition of such conduct and the need to protect the public. Ultimately it is a question of degree.

[20] In applying the first test I find that the offending conduct has been established on a balance of probabilities. Factually paragraph 9 of the certificate is an incorrect interpretation of the Rule Nisi issued by Sutherland J.

[21] The second question for determination is whether the respondent is a fit and proper person to continue practice. Hefer JA in *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA) accepted Heher J's observation that

'(t)he word of an advocate is his bond to his client, the court and justice itself. In our system of practice the courts, both high and low, depend on the ipse dixit of counsel at every turn.'

[22] It is therefore necessary to assess whether the wording of clause 9 of the certificate read together with the documents attached to the rule nisi amount to a situation where the respondent knowingly and deliberately tried to mislead a foreign court or foreign lawyers. I find that the ipse dixit as found in paragraph 9 is worded clumsily. I also find that the paragraph as a whole must be read. The paragraph ends with the words 'she is called upon to do so on 19 January 2010'. The respondent does not hide the fact that she will have to do something on 19 January 2010. It is incomprehensible why the respondent makes this reference juxtaposed to the words 'she will immediately be arrested to answer the order'. A lawyer reading this paragraph will be left in no doubt that on 19 January 2010 she will be given an opportunity to answer her non-compliance with the court order. The import of the applicant's approach in essence is that the word 'arrest' must be considered on its own. The principles emerging from the *Geach* judgment are clear namely that all the material facts must be considered. In coming to the conclusion that I do the following is noted.

[23] One cannot lose sight of the fact that the certificate was accompanied by documents that do not reflect the immediate arrest of Z. Paragraph 9 read as a whole makes provision for her to come and explain her conduct. A further material fact is that the respondent spontaneously and immediately explained that his wording was clumsy. The clause prima facie is manifestly awkwardly and clumsily worded. English is not this respondent's mother tongue. I also take into account the certificate was prepared in haste. I cannot ignore his submission that his overwhelming belief that she would not discharge the

onus was present in his mind when he prepared the certificate. The second test has to take into account all these factors. In my view this lapse of judgment and skill is not something that will easily be repeated. The conduct is inconsistent with a carefully planned modus operandi where the respondent has shown a propensity to break his bond to the relevant parties and entities in Belgium. It was clear that the order of Sutherland J did not order Z's immediate arrest. If a misrepresentation was intended a far more detailed and carefully crafted explanation in the certificate would have been attempted.

[24] In applying the third principle in deciding whether to strike an advocate from the roll the principles were analysed by the Supreme Court of Appeal and the appropriate approach was laid down. In *Geach supra* para [57] the SCA confirmed that at the third stage of the enquiry concerning the sanction the imposition lies within the discretion of the court. Where discretion is conferred it implies that the matter for decision has no single answer and calls for judgment, upon which reasonable people might disagree. At para [73] of G*each supra* the proper approach is to ask whether the circumstances as a whole reveal that the case the court has before it is an exception from those in which it can ordinarily be inferred that the dishonesty will recur and should thus be met with striking off. The court warned against a debate about a particular factor as being a 'circumstance' that is 'exceptional' — or 'mitigating' or 'aggravating' as that leads the enquiry astray.

[25] At para [74] of *Geach supra* the question that fell for decision was whether, upon an evaluation of all the material circumstances, which include

'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 are all factors for consideration.

[26] This is not a case where the respondent has lied under oath. In *Kekana v Society of Advocates of South Africa* 1998 (4) SA par 14 649 (SCA) 'as a matter of principle, an advocate who lies under oath in defending himself in an application for the removal of his name from the roll, cannot complain if his perjury is held against him when the question arises whether he is a fit and proper person to continue practising.' The respondent has claimed an error on his part. This is a plausible explanation and in the absence of cross examination I cannot find that he deliberately and knowingly drafted the certificate to mislead parties in Belgium. The court order of Sutherland J is clear in its terms. Having regard to all the material circumstances I cannot find that the respondent deliberately and knowingly lied under oath in his answering affidavit.

[27] Heher J (as he then was) in *Kekana a quo* at p6654 stated 'This is why there is a serious objection to allowing an advocate to continue practising once he has revealed himself as a person who is prepared to lie under oath. Legal practitioners occupy a unique position. On the one hand they serve the interests of their clients, which require a case to be presented fearlessly and vigorously. On the other hand, as officers of the Court they serve the interests of justice itself by acting as a bulwark against the admission of

fabricated evidence. Both professions have strict ethical rules aimed at preventing their members from becoming parties to the deception of the Court. Unfortunately the observance of the rules is not assured, because what happens between legal representatives and their clients or witnesses is not a matter for public scrutiny. The preservation of a high standard of professional ethics having thus been left almost entirely in the hands of individual practitioners, it stands to reason, firstly, that absolute personal integrity and scrupulous honesty are demanded of each of them and, secondly, that a practitioner who lacks these qualities cannot be expected to play his part.'

[28] In my view the respondent has not been exposed as a person who upon the issue being brought to his attention has given false information to a committee of the professional society namely the applicant. The moment the issue was brought to his attention he was immediately and spontaneously apologetic and used every opportunity to demonstrate this. Even in proceedings before Blieden J as early as March 2010 and even before the respondent gave a written explanation or before he was called on to do so, he showed absolute remorse. He could not be expected as the applicant expects to admit to a falsity he did not knowingly commit. His certificate was attached to court documents where the provisions of the rule nisi were clear. It is also clear that no one in Belgium relied on the certificate. This fact however does not absolve a practitioner from being careful and scrupulous about what he or she conveys. A further material fact is that the rule nisi was explained in the Belgium proceedings by a South African advocate practising in Belgium so no prejudice resulted.

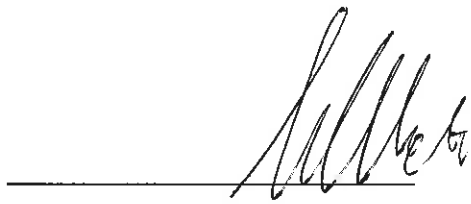
[29] In my view the immediate response by the respondent to the problem does suggest of a character and personality profile that he is a person capable of reform and that he should be given a chance but be subjected to a period of suspension. English is not his mother tongue. Paragraph 9 of the certificate is prima facie worded in poor English. In my view the conduct justifies suspension not striking off.

[30] Such period of suspension should serve as a lesson to the respondent to reflect that even in circumstances of urgency and notwithstanding the fact that English is not his mother tongue he has to be scrupulous and careful in making averments in documents emanating from him as an advocate..

The order that I would make is:

1. The respondent is suspended from practice for a period of 6 months with effect from 1 March 2015 to 31 August 2015.

2. Save that the respondent shall pay any disbursements incurred by the applicant in these proceedings there shall be no order of costs.



M. Victor

Judge of the High Court of South Africa

R Monama

Judge of the High Court of South Africa

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