


REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
7/08/2014	
DATE	SIGNATURE

7/8/2014

Case Number: A989/2013

In the matter between:

ANDILE MVATHA

Appellant

And

THE LAW SOCIETY OF THE NORTHERN PROVINCE
(Incorporated as the Law Society of the Transvaal)1ST RespondentJ H JOOMA
(Magistrate and a complainant)2ND RespondentJ TARICA
(Chairperson of the disciplinary committee)3RD RespondentAY BHAYAT
(Committee member)4TH RespondentM C MAUBANE
(Committee member)5TH Respondent

JUDGMENT

MOLEFE J:

[1] This is an appeal in terms of section 73 of the Attorneys Act 53 of 1979 as amended ("the Act") against the finding of a disciplinary committee of the first respondent into the alleged unprofessional, dishonourable and unworthy conduct of the appellant in terms of section 71 of the Act.

[2] The appeal is brought in terms of section 73 of the Act which reads as follows:

"A person who has been found guilty in terms of section 72 may within a period of thirty days of the date of the council's decision appeal to a competent court against that finding by lodging with the Registrar of that court a notice of appeal setting out in full his ground of appeal"

[3] It is common cause that:

3.1 the appellant is an admitted attorney employed by the Legal Aid South Africa and was at the time of the incident a resident attorney in the second respondent's court.

3.2 the second respondent is a Regional Magistrate at Orlando Magistrates Court and is the complainant in this matter;

3.3 the third, fourth and fifth respondents are members of the disciplinary committee of the first respondent.

[4] The charge levelled against the appellant was that he was guilty of unprofessional, dishonourable or unworthy conduct in that his conduct towards an official of court Magistrate M H Jooma (the second respondent) on 24 November 2011 and for unreasonably withdrawing from the criminal matter of his client was unbecoming as an attorney.

[5] The disciplinary enquiry was conducted on 31 October 2013 and the first respondent:

5.1 found the appellant guilty as charged;

5.2 imposed a fine of R3000,00 of which 100% was suspended for a period of three years on condition that the appellant is not convicted of the same or similar offence during that period;

5.3 ordered the appellant to pay the *pro rata* costs of the disciplinary proceedings on or before the

end of January 2014.

- [6] Both the appellant and the second respondent testified at the hearing and their two versions are in conflict with each other.
- [7] Two affidavits were provided to the committee, one in support of the appellant's version by Ms Nelisa Soji, being the appellant's Supervisor and one in support of the second respondent by Ms Pumsi Sangweni, the stenographer in the second respondent's court. Neither of these deponents attended the enquiry to be questioned.
- [8] The appellant's grounds of appeal are that the proceedings were procedurally unfair in terms of section 33 (1) of the Constitution and that the appellant was not given a fair administrative hearing.

Procedurally unfair proceedings

8.1 Section 33 (1) of the Constitution stipulates that:

"Everyone has the right to administrative action that is lawful, reasonable, procedurally fair"

However, any cause of action must be based on the administrative justice Act 3 of 2000.

8.2 The appellant submits that the initial complaint was not done under oath by the second respondent and the subsequent affidavit was commissioned by the Clerk of the court in which the second respondent acted as Magistrate. The appellant's counsel submits that the clerk of court is not a commissioner of oath and the same office cannot commission its own document.

8.3 In terms of section 71 (1) of the Act and Rule 94.2 of the Rules of the Law of Society ("Rules") the disciplinary committee appointed in terms of section 67 of the Act may *mero motu* exercise its powers under the rules and may also require the complainant to provide an affidavit with further particulars on any aspect of the complaint.

The person administering the oath must have been authorised to do so and must be one of the persons mentioned in the schedule to the Justices of the Peace and Commissioner of Oaths Act 16 of 1963.

Even if no proper complaint was before the disciplinary committee, it may exercise its powers even in the absence of any complaint. In this regard the proceedings were in my view procedurally fair.

Fair administrative hearing

second respondent was also allowed to cross-examine the appellant but the appellant did not cross-examine the second respondent.

Furthermore, the committee allowed and accepted the affidavit made by Ms Sangweni in support of the second respondent's case but objected to the cross-examination of the second respondent on the affidavit made by Ms Soji in support of the appellant's case.

- 8.5 I agree with the respondents's argument that the second respondent is the complainant and is not represented by the pro forma prosecutor. The pro forma prosecutor acts on behalf of the first respondent. The appellant through his legal representative was afforded the opportunity to question the second respondent. Had the appellant wished to cross-examine the second respondent he should have provided his legal representative with instructions on further questions he wished to be put to the second respondent.

I therefore do not see how the appellant was unfairly treated in this regard.

- 8.6 The averment by the appellant that the committee objected to the questions asked to the second respondent is not factually correct. It is clear on the record that the appellant's legal representative commenced questioning the second respondent regarding Ms Soji's affidavit and confirmed that Ms Soji would be called to testify. (See Record: pages 38-39). It was only later that it became clear that Ms Soji would not be attending the hearing as a witness. In my opinion this ground of appeal is without any merit and should not be entertained.

Failure of the Committee to assist the appellant with the calling of witnesses

- [8.7] The appellant bemoans the fact that the committee refused to assist him to procure the attendance of material witnesses;

I agree with the respondents' arguments that the appellant has a duty to ensure that the witnesses he wishes to present to the committee are present at the hearing, failing which, he should have, at the commencement of the proceedings, applied for a postponement in order to procure the attendance of such witnesses.

I am satisfied that *in casu* the disciplinary hearing was procedurally fair and the appellant was granted a fair administrative hearing.

- [9] The court has now to consider (a) whether or not the appellant had conducted himself in an unprofessional or dishonourable or unworthy conduct towards court official to with the second respondent and (b) whether or not the appellant's withdrawal from the criminal cases on 24

November 2011, was unreasonable and unbecoming of an attorney.

[10] The second respondent alleged that on 24 November 2011, the appellant shouted at him in court, raised his voice and informing the second respondent that he should not talk to him in the manner that he was and he just raised his voice again. The second respondent then asked him to leave his court. The appellant disputed each and every allegation levelled against him by the second respondent. The appellant testified that the second respondent shouted at him in court and asked him to leave his court. He alleged that he left the court without shouting nor banging the door as alleged by the second respondent.

[11] It is very strange that despite the second respondent's allegations that the appellant was speaking to him in court and "*in a condescending way as to diminish the integrity of the court*" while the public was witnessing this, he failed to hold the appellant in contempt of court; The second respondent instead lodged a complaint against the appellant.

[12] It is important that proceedings in court proceed smoothly and are conducted in an orderly manner. For that reason there is provision to deal with those who do not respect the courts and the legal process. Misbehaviour while the court is in session, calculated to violate the dignity of the court or judicial officer, or conduct which is disruptive of court proceedings can amount to contempt of court *in facie curiae*.

The court may summarily subject the offender to trial contempt of court, and in the event of conviction, sentence him or her forthwith. There is no explanation by the second respondent why he failed to hold the appellant in contempt of court other than say: "*I should have actually held contempt proceedings against Mr Mavatha, which is exactly what my colleagues would have done after informing them of the manner in which he behaved on that particular day*" (Supplementary Record Page 9).

I am not satisfied that the appellant conducted himself in an unprofessional or dishonourable or unworthy conduct towards the second respondent on 24 November 2011.

[13] The second issue is whether the appellant's withdrawal from the criminal cases which were set down for hearing on 24 November 2011, was unreasonable and unbecoming of an attorney. The relevant cases are:

(i) **Sello Mabotja and Another** (record of appeal Vol 1 Page 10-36), accused 1, was represented by another attorney and the appellant represented accused 2. On 13 October 2011 the appellant represented both accused and both accused abandoned the bail application. On the 24 November 2011, there was a conflict of interest as the two accused were pointing fingers at each other and the appellant withdrew as an attorney.

(ii) **Grappy Mathebula and Another** (record of appeal Vol 1 page 37-50). On 13 October 2011, it was for the first time the appellant came on record and both the accused were in custody. The matter was remanded for plea and trial on 24 November 2011. On the 24 November 2011, the appellant appeared for accused 1 and one Mr Mkhari came on record for Accused 2 and this created a conflict of interest and the appellant withdrew as an attorney of record.

[14] I am of the view that the circumstances under which the appellant withdrew from the record warranted such withdrawal in both cases. It is trite that a legal representative may not undertake the defence of accused who incriminate each other reciprocally or who have mutually destructive versions of the facts. If it appears in the course of the trial that there is such a conflict of interest, the legal representative must immediately withdraw from the defence of all accused. See **S V Moseli(1) 1969 (1) SA 646 (0).**


[15] It is obviously untenable for a legal representative to conduct cross-examination or argue in conflict with the interests and / or instructions of someone with whom that representative had in that very case a legal-adviser-client relationship. In a case where the advocate did not withdraw in this manner, both convictions were set aside and the case was referred to the attorney-general for action according to his discretion. (See **S V Jacobs 1970 (3) SA 493 (EC).**)

[16] I am therefore of the opinion that the second respondent failed to establish a proper complaint upon which the appellant could be found guilty as charged.

In the premises, I make the following order:

The appeal is upheld and the finding as well as the penalty imposed by the committee of the

Law of Society of the Northern Province is set aside.



MOLEFE D S
JUDGE OF THE HIGH COURT

I agree, and it is so ordered



FABRICIUS H J
JUDGE OF THE HIGH COURT