THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

CASE NO: 57/98

In the matter of:

KLEINBOOI KEKANA

Applicant

and

SOCIETY OF ADVOCATES OF SA Respondent

CORAM: HEFER, NIENABER, OLIVIER, SCOTT JJA et
MELUNSKY AJA

HEARING: 18 May 1998

DELIVERED: 1 June 1998

J U D G M E N T

HEFER JA

HEFER JA

This is a petition for the reinstatement of an appeal which, in terms of Rule 5(4)bis(b) of the rules of this Court, is deemed to have been withdrawn. Not unlike a petition for condonation it falls to be considered upon a conspectus of all the relevant features including the degree of non-compliance with the rules, the explanation therefor, the importance of the case and the prospects of success.

Let me say at the outset that, when I read the papers the first time, it appeared to me that this might well be a case where the non-observance of the rules was so flagrant that the prospects of success need not be considered. (Cf Ferreira v Ntshingila 1990(4) SA 271 (A) at 281I-282B.) Although the applicant is seeking to appeal against an order removing his name from the roll of advocates and one would in such a case expect diligent observance of the rules, the degree of non-compliance was gross. After the Court a quo had granted leave to appeal not a single step was taken in time. In fact, for about five months and for reasons that we do not know, the attorneys who

represented the applicant at that stage took no steps whatsoever to prosecute the appeal. When the respondent informed him that his appeal had lapsed the applicant put together something which he apparently thought could pass for the record of the proceedings in the court a quo, but which was in such a state that it was not accepted when he presented it to the registrar of this Court. The applicant is not

a layman; he was admitted as an advocate during 1988, lectured at a university for four years, passed the national Bar examination, and practised his profession for another four years until his name was removed from the roll. But in his own words, it was the registrar who then "apprised [him] of procedures and requirements". Thereafter he enlisted the services of a Bloemfontein attorney. It took another (unexplained) four months before a petition for condonation was prepared and filed, and an additional (unexplained) two months before the registrar received the notice of appeal and record.

At the hearing, however, although the petition tells a woeful tale of ignorance, ineptness and indifference as far as the rules are concerned, we called upon counsel on both sides to address us on the

prospects of success. We did so because we also have to take account of the applicant's personal intervention after becoming aware that his attorneys had left him in the lurch, his serious (though inept) efforts thereafter to have the appeal reinstated, the dire consequences of the order removing his name from the roll, and the fact that the respondent opposes the application on the ground of the absence of prospects of success only. Having heard the argument and having considered all relevant matters including the prospects of success, I am now firmly of the view that the petition ought to be refused. I proceed to demonstrate why I have come to this conclusion.

The application for removal came about as a result of a report which the respondent received from a judge who had presided at a cession of the circuit court at Tzaneen where the applicant and a colleague, Mr Mabena, had appeared as pro deo counsel. The Bar Council decided to hold an internal enquiry. Charges were prepared and served. But it soon became clear that there were material disputes of fact. This, and the fact that serious allegations involving dishonesty on the part of the applicant and Mabena had been received, persuaded

the Council to discontinue the enquiry and to commence proceedings for the removal of their names from the roll.

In the founding affidavit the chairman of the Bar Council brought several matters relating to the Tzaneen circuit to the court's attention. With most of these we need not concern ourselves because they have fallen by the wayside. What does concern us, is an allegation to the effect that the applicant and Mabena had submitted claims to the Department of Justice for amounts in respect of hotel accommodation and meals taken at restaurants to which they were not entitled. The gravamen of the respondent's case in this regard was that the applicant and Mabena had included in their claims the costs of the hotel accommodation and restaurant meals of two women who were in their company at Tzaneen. The claims in respect of accommodation eventually also came to nought and nothing further need be said in that regard. As far as the meals are concerned, it is common cause that the applicant submitted two accounts with his pro deo claim. One of these was from the Emerald Creek Spur restaurant for food and other items served during the night of 26-27 October 1994. It reflected two

main courses. The other account was from the Porterhouse restaurant for food and other items served on 9 November 1994. It also reflected two main courses. The accounts which Mabena submitted with his claim were similar except that his Porterhouse account reflected only one main course. The respondent's case was that the applicant had claimed the costs of his guest's meal on both occasions, and that Mabena had done the same in respect of the first occasion.

In support of its allegations regarding the meals at the Emerald Creek Spur the respondent filed an affidavit by Mr John Kirstein in which he described how he had served a party consisting of two men and two women in that restaurant during the night of 26-27 October 1994 and afterwards prepared two separate accounts, each reflecting two main courses. They were the accounts referred to earlier.

In his opposing affidavit the applicant did not dispute that he and Mabena had visited the restaurants on the occasions in question. But he denied the presence of companions. His version was that in the Emerald Creek Spur he and Mabena each first consumed one main course and, because they were still hungry, thereafter ate another. His

only explanation for the two main courses reflected in the Porterhouse account was that he had inadvertently paid some other customer's account. Mabena only filed a short affidavit confirming what the applicant had said about the meals taken at the Emerald Creek Spur.

The matter eventually came before two judges for oral evidence. Mr Kirstein confirmed the contents of his affidavit and particularly that the party in respect of whom the first two accounts had been issued, consisted of two men and two ladies. Mabena did not testify but the applicant did. In his evidence he repeated his assertion that he and Mabena were alone when they went to the restaurant during the night of 26-27 October and that each of them ate two main courses. On 9 November, he testified, he paid the account without looking at it. But for the first time he now claimed that on that occasion too he had eaten two main courses.

The Court a quo rejected the applicant's evidence as untruthful and returned a finding to the effect that he and Mabena had indeed included the costs of their guests' meals in the claims submitted to the Department. Their conduct satisfied the court that they were not fit and

proper persons to continue practising as advocates. Mabena was suspended from practice for a period of twelve months and the applicant's name was ordered to be removed from the roll.

Before I deal with the argument in this Court it is necessary to have clarity on the approach to appeals like the one that the applicant wishes us to reinstate.

In terms of sec 7(1) of the Admission of Advocates Act 74 of 1964, as amended, the court may suspend any person from practice, or order that the name of any person be struck off the roll, if it is satisfied that he is not a fit and proper person to continue to practise as an advocate. The way in which the court had to deal with an application for the removal of an attorney's name from the roll under a similar provision in the Attorneys, Notaries and Conveyancers Admission Act 23 of 1934, as amended, (before that Act was repealed), was considered in Nyembezi v Law Society, Natal 1981(2) SA 752 (A) at 756H-758C. It emerges from the judgment that the court first has to decide whether the alleged offending conduct has been established on a preponderance of probability and, if so, whether the person

in

question is a fit and proper person to practise as an attorney. Although the last finding to some extent involves a value judgment, it is in essence one of making an objective finding of fact and discretion does not enter the picture. But, once there is a finding that he is not a fit and proper person to practice, he may in the court's discretion either be suspended or struck off the roll.

This is plainly how an application for the removal of a person's name from the roll of advocates must also be handled. All that need be added, is that appellate interference with the trial court's discretion is permissible on restricted grounds only. In Beyers v Prtoria Balieraad 1966 (2) SA593 (A) at 605 F-H, Olivier v Die Kaapse Balieraad 1972 (3) SA 485 at 495 D-F and Swain v Society of Advocates, Natal 1973 (4) SA 784 (A) at 786H ad fin the grounds for interference are stated in slightly different terms, but the approach is essentially the one

adopted in all other cases where a court of appeal is called upon to interfere with the exercise of a discretion viz that interference is limited to cases in which it is found that the trial court has exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased

judgment to bear on the question, or has not acted for substantial reason. (See Benson v SA Mutual Life Assurance Society 1986(1) SA 776 (A) at 781I-782B and the cases referred to there.)

In the present case the applicant does not contest the Court a quo's factual findings or the finding that he is not a fit and proper person to continue to practise as an advocate. All that his counsel are seeking to achieve, is to persuade us that he has been treated too harshly. They argue that, particularly in view of the trifling amount involved and the applicant's relative inexperience, the Court a quo over-emphasized the importance of his perjured evidence, and in any event failed to maintain reasonable parity in its treatment of two offenders whose misconduct did not differ materially.

I am by no means convinced that this argument brings the matter within the compass of the recognised grounds for interference. But it is not necessary to decide this question for, assuming that we are entitled to interfere, the question is whether we ought to do so; and I am of the view that we should not.

The amount which the applicant was not entitled to claim is

indeed trifling. Of this the trial court was perfectly aware. But this Is not the main consideration. I respectfully agree with the following remarks of Hefer J who delivered this part of the Court a quo's judgment:

> "The two respondents have behaved in a manner unbecoming of counsel. They have committed fraud on the Department of Justice. The circumstances were such that they knew that the information furnished by them could not be checked without great difficulty, and the department was therefore reliant on their absolute honesty. The money which the respondents procured by their fraud was public money, set aside to ensure the proper defence of indigent people. To say that the respondents stood in a position of public trust, is not overstating the case. True, the amounts that they obtained by their fraud were petty, but there was no case of need. It was a considered, ex post facto device to pay for private entertainment. In the case of the first respondent, the fraud was repeated ten days later. The offences were serious, they were criminal."

Then there is the matter of the applicant's perjury which the Court a quo rightly took into account as an aggravating feature of the case and which undoubtedly tipped the scale in the decision to strike his name from the roll. It is necessary to know in this regard that the assertion that two main courses were required to still their hunger first

appeared in the applicant and Mabena's written response to a list of questions submitted to them by the committee of the Bar Council which conducted the initial enquiry. I have already mentioned the applicant's opposing affidavit (confirmed by Mabena) where the same explanation was given for the two main courses reflected in the Emerald Creek Spur account. I have also mentioned that the applicant repeated this patently false assertion in his oral evidence and extended it to cover the meal taken at the Porterhouse as well.

I share the view expressed in Olivier's case (supra) at 500H ad

fin that, 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. I also support Heher J's observation in the present case 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."

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.

The applicant has been exposed as precisely such a person in a particularly illuminating way. He gave false information to a committee

of the professional society to which he belonged. He committed perjury in his opposing affidavit. And he repeatedly did so again when he testified in court. His counsel argued in mitigation of his conduct that all these incidents must be viewed as one "episode". I am not sure that I quite understand what counsel tried to convey or how such a view can assist his client. Nor do I accept that the untruths in his replies to the committee of the Bar committee's questions had set him on a course from which he could not retreat. On the contrary, when he received the founding affidavit he should have realized that the time for telling the truth had arrived. He did not do so. When the matter later went to court he had another opportunity to make a clean breast. He did not use it. Instead he allowed his counsel to cross-examine witnesses on instructions which to his knowledge were false. Finally he lied to the court. His lies were premeditated and obviously well rehearsed. That he did so in an attempt to protect his own interests and not in his professional capacity is no excuse. Should he be allowed to continue practising and should he ever as an advocate find himself in a position were he can prevent a witness from misleading the court, I have no

confidence that he will do so.

Finally there is the disparity in treatment which I have also mentioned and which the court a quo justified in the light of the applicant's greater experience at the Bar and the fact that Mabena did not testify at the trial. Whilst I am prepared to accept that these factors might not warrant such a marked difference, it is clear that the applicant went much further than Mabena in perpetuating the lies initially told to the Committee of the Bar Council. He deserved to be treated more harshly. If the court a quo erred by ordering his name to be removed from the roll while suspending Mabena from practice for a year only, it erred, in my view, by letting the latter off so lightly.

The appeal was also aimed at the Court a quo's order that the applicant and Mabena pay the respondent's costs. Since all the charges in the application for removal had not been established, the applicant's counsel argue that the order should have been that the respondent should pay at least part of his and Mabena's costs. I agree that this is a case in which such an order could have been made. But the Court a quo considered it and, for reasons which need not be

repeated, decided not to make it. The applicant's counsel have not persuaded me that interference with the court's discretion as to costs is justified.

The petition for the reinstatement of the appeal is dismissed with costs, including the costs of the appeal.

JJF HEFER Judge
of Appeal

Nienaber JA)
Olivier JA) Agree
Scott JA)

REPUBLIC OF SOUTH AFRICA

CASE NO: 57/98

In the matter between:

K KEKANA Applicant

and

THE SOCIETY OF ADVOCATES OF SA Respondent

Coram: Hefer, Nienaber, Olivier, Scott JJA et Melunsky AJA

Heard: 18 May 1998 Delivered: 1 June 1998

JUDGMENT

MELUNSKY, AJA:

I have read the judgment of my Brother Hefer JA but, with respect, I am unable to agree that the petition for reinstatement of the appeal should be refused. The substantial question is whether the applicant has reasonable prospects of success in the appeal. If he does the petition should succeed.

In this Court counsel for the applicant did not challenge the decision of the court a quo to reject the applicant's evidence as untruthful. He accepted, in the circumstances, that the applicant was not a fit and proper person to continue to practise as an advocate. He submitted, however, that the trial court had incorrectly exercised its discretion to strike him off the roll and argued that a suspension from practice would have sufficed in the circumstances of the case.

As Hefer JA correctly states, this court has limited grounds for interfering with a trial court's discretion in matters of this nature. The test which must be satisfied before a trial court's discretion may be interfered with is the following:

> "Can it be said . .that the Court a quo has exercised its discretion capriciously or upon a wrong principle, that it has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons?"

(See Reyneke v Die Wetsgenootskap van die Kaap die Goeie Hoop 1994(1) SA 359 (A) at 369 E-F.)

It is desirable to refer to the judgment of Heher J who delivered the judgment of the court a quo on the question of the appropriate penalty to be imposed. In the course of his judgment the learned judge said:

> "The situation is that the first respondent is not a fit and proper person to practise as an advocate. The question is whether

that situation will change, whether he will reform, should he be subjected to a period of suspension. His persistence in turning his back on the truth and the gratuitous placing of the blame on others until now, is evidence that over the last 18 months he has developed no insight and no greater perception of what is expected of him. This, it seems to me, is a defect of character which is hardly likely to be ameliorated or amended with the passing of time.

The second respondent is in a different category. He was less experienced at the relevant time. Although he plainly gave his counsel the same instructions as the first respondent and he made common cause with the first respondent, he did not give lying evidence. His offence was only committed once. It seems to me that the possibility of reform remains in his case and there is no reason why the second respondent should not be brought to his senses within a reasonably short time."

In his judgment in granting leave to appeal Heher J said:

"This matter originally concerned us greatly and caused us a considerable amount of debate. We earnestly weighed the various factors we considered to be important before arriving at our conclusion.

We think that another court may well find that our process of adjudication gave too much emphasis to the perjured evidence and the persistence in the dishonest

> approach to the defence which was adopted by the first applicant and to the persistence in a dishonest defence (although no perjury was involved) in the case of the second applicant.
>
> We think that it is also not likely that another court may consider that the dishonesty involved a matter of such trifling substance that we should not have allowed that to influence our judgment as we did.
>
> The personal circumstances and professional circumstances of the two appellants were such that another court may consider that there was no basis for drawing any distinction between the two, that both applicants should have been treated in the result in the same manner and that our failure to do so was an improper exercise of a judicial discretion."

The judgment in the court a quo was delivered on 29 October 1996. Mabena was suspended from practice for a period of 12 months from 15 April 1996, an effective suspension of less than 6 months. There was, therefore, a substantial disparity between the penalty imposed on the two respondents in the court a quo. The desirability of imposing equal sentences

on persons who participate equally in the commission of an offence has from time to time enjoyed the attention of this Court. (See, for example, S v Giannoulis 1975 (4) SA 867 (A) at 873 F-H and S v Marx 1989 (1) SA 222

(A) at 225 G- 226 B). The principles in sentencing cases, however, cannot be applied to matters of this nature without qualification. Where the penalty to be imposed on an offending advocate arises, other issues have to be considered, including the need of the courts to be concerned with the maintenance of high ethical standards in the legal profession, the protection of the public and the likelihood of the offender reforming. It does, however, seem to me that even in matters of this nature a court should, where reasonably possible, try to avoid disparity in its treatment of offenders.

A court of appeal should not interfere simply because the penalty imposed on one offender is substantially more severe to that imposed on another. If

it appears that the court of first instance based its decision to treat the offenders differently on an incorrect appreciation of the facts, interference would be permissible unless the court of appeal was of the view that the lighter penalty was inappropriate or that the more severe penalty was, in all the circumstances, fully justified.

In the present case Mabena deposed to an affidavit in which he confirmed the correctness of the allegations contained in the applicant's affidavit in so far as they applied to him. The case made out by the applicant in his affidavit was that he and Mabena were not accompanied by partners at the Emerald Creek Spur Restaurant and that they had personally eaten the meals for which they each claimed payment.

After the affidavits were filed the matter was dealt with by viva voce

evidence. The applicant testified under oath that Mabena did not. But Mabena did not, while the merits of the case were being dealt with, retract his affidavit or withdraw his defence or apologise for his dishonesty for persisting in his false denial. In fact, as I understand the judgment, Mabena, through his counsel continued to assert his innocence until, at least, judgment had been delivered on the merits. This judgment was given by Stafford J who said the following:

> "In his own case, the second respondent [Mabena] chose to sink or swim with the first respondent, making no attempt to save himself, once again for no acceptable reason other than his unwillingness to tell the truth and/or to subject himself to cross-examination."

From the extract of the judgments by Heher J, quoted above, it would appear that the court a quo might have overlooked that Mabena, too, perjured himself. In all events it seems to be clear that the court made no

mention of Mabena's affidavit or of the fact that he persisted in his false

denial of dishonesty throughout the hearing.

To sum up, at this stage, it is my view that not only was there a substantial disparity between the penalties imposed on the two offenders but that the court a quo, in deciding upon the penalties, may not have properly considered all of the relevant factors. These factors, coupled with the important fact that there is indeed a reasonable prospect of the applicant reforming (which I deal with later) entitle this Court to consider afresh the question of penalty.

It remains to consider whether the suspension given to Mabena was too lenient or whether, in all the circumstances, the striking off of the applicant was too severe. This is a matter which has caused me a great deal of concern. On a consideration of the issues I am of the view that it is too

harsh a judgment to assume that there is little likelihood of the applicant reforming. He had an unblemished record before the events which gave rise to his striking off. Moreover he continued to practice as an advocate, without complaints about his conduct, for a substantial period of time after he gave notice of his application for leave to appeal until his appeal lapsed. It is also significant that in the application for leave to appeal, and before this court, he did not challenge the finding that he was not a fit and proper person to continue to practice. It seems to me that he does, indeed, have proper insight into his misconduct. It is true that the facts which I have mentioned occurred since the judgment of the court a quo and that it should only be an exceptional circumstances that facts occurring subsequent to the judgment should be considered on appeal. This seems to me to be one of the cases where this court can have regard to such facts. I am therefore of the view that there is a reasonable prospect of the applicant reforming.

1 I have not overlooked the fact that the applicant gave false evidence under oath. This is a serious and aggravating feature and has caused me to doubt whether, notwithstanding the other factors, his removal from the roll might not be the appropriate order. After weighing up all of the matters, however, I consider that the court a quo correctly suspended Mabena - although the effective period of suspension might have been somewhat short - and that it would probably have been more appropriate if the applicant, too, was suspended. As this view is not shared by the majority of this Court, there

is

no need for me to consider what order should be made.

L S MELUNSKY