THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 054/2011

In the matter between

THE LAW SOCIETY OF THE CAPE OF GOOD HOPE	**APPELLANT**
and	
HEINRICH NEL	**RESPONDENT**

Neutral citation: *Law Society of the Cape of Good Hope v Nel* (054/11) [2011] ZASCA 200 (23 November 2011)

Coram: **NAVSA, HEHER, SHONGWE, MAJIEDT and WALLIS JJA**

Heard: **2 NOVEMBER 2011**

Delivered: **23 NOVEMBER 2011**

Summary: Attorney – misconduct – alleged contravention of Rule 14.3.14, promulgated under the Attorneys' Act 53 of 1979 – bringing attorneys' profession into disrepute – formulation of charge sheet crucial – evidence not sustaining the charge as formulated – disciplinary proceedings not civil proceedings but sui generis.

ORDER

On appeal from: Eastern Cape High Court, Grahamstown (Chetty and Revelas JJ sitting as court of appeal):

The appeal is dismissed with costs.

JUDGMENT

MAJIEDT JA (NAVSA, HEHER, SHONGWE and WALLIS JJA concurring):

[1] The appellant appeals against the judgment of the Eastern Cape High Court, Grahamstown (Chetty and Revelas JJ, sitting as court of appeal in terms of s 73(1) of the Attorneys Act 53 of 1979 [the Act]), in which it set aside both the finding by a disciplinary committee of the appellant, that the respondent, a practising attorney and one of the appellant's members, had contravened rule 14.3.14 of the appellant's rules[1] and the concomitant sanction. The appeal is with leave of the court below.

[2] The respondent was called upon to answer two charges, only the first of which is relevant for present purposes. It arose from a complaint by Mr Dirk Swanepoel, who was at the time of the complaint serving a sentence of 22 years' imprisonment for murder, and was based on a conversation between him and the respondent on the day of his arrest, in which he sought certain advice concerning bail. As will become apparent, this charge, as formulated in an annexure to the summons issued by the disciplinary committee, is central to this appeal and I reproduce it in full:

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[1]The rules have been framed in terms of s 21(1) of the Law Societies Act 41 of 1975 as substituted by s 74(1) of the Attorneys Act 53 of 1979 and promulgated in Government Gazette 5255, dated 20 August 1976. They have over time undergone various amendments, the last of which was by way of Government Gazette 34683 of 21 October 2011.

'CHARGE OF UNPROFESSIONAL OR DISHONOURABLE OR UNWORTHY CONDUCT ON THE PART OF HEINRICH NEL (HEREINAFTER CALLED "THE MEMBER")

FIRST CHARGE – CONTRAVENTION OF RULE 14.3.14

The member is charged with unprofessional conduct in that on or about 23 January 2002 he advised one Dirk Hermanus Swanepoel, who was apprehended by the South African Police in a murder investigation and who had sought the advice of the member in this regard, that "it could never be said that it would be harmful in a bail application if a policeman could stand up in Court and confirm that he obtained the co-operation from the accused right from the outset". This advice did, alternatively had, the potential to cause Swanepoel to act in ignorance of his right to remain silent to his prejudice or to his potential prejudice.

In so doing the member brought the attorneys' profession into disrepute.'

[3] The disciplinary committee reached its guilty verdict solely on the basis of the Respondent's written response to Swanepoel's written complaint. It was also referred to the judgment of Mthiyane JA in Swanepoel's appeal against his conviction. I shall revert to this aspect in due course. Having found the respondent guilty of bringing the attorneys' profession into disrepute, the disciplinary committee imposed what it considered to be a moderate fine upon the respondent.[2] An appeal in terms of s 73 of the Act against this finding and sanction was upheld by the high court, which found that the admissible evidence before the disciplinary committee was insufficient to sustain the guilty verdict.

[4] The factual backdrop to the disciplinary proceedings is briefly as follows:

(a) The respondent had been instructed by a client, Mrs Groenewald, to investigate the disappearance of her husband. Investigations into Mr Groenewald's cellular telephone records led the respondent to Swanepoel,

[2] No particulars of the fine imposed appear from the record.

not as a possible suspect, but as a potential witness against two men who the respondent regarded as suspects.

(b) In the light of information gleaned from the phone records, the respondent set up a meeting with Swanepoel at the respondent's office. Upon being confronted with the fact that the phone records reflected certain phone calls between him and Groenewald before the latter's disappearance, Swanepoel denied all knowledge of Groenewald's disappearance. During the meeting the police arrived and arrested Swanepoel in connection with Groenewald's disappearance. Up until this stage there was no attorney-client relationship between Swanepoel and the respondent. It is not necessary to decide whether such arrest occurred coincidentally at that time, at the respondent's office (as he averred), or had been arranged by the respondent (as Swanepoel appeared to suggest in his complaint).

(c) Later that afternoon a policeman, Inspector Pietersen, telephoned the respondent from the detectives' offices at the police station and informed him that Swanepoel, who was in police custody, wanted to speak to him. During their conversation Swanepoel asked the respondent whether it would assist him (Swanepoel) in a bail application if he co-operated fully with the police. The respondent replied that Swanepoel could say what he wanted to the police, since, on his version, he had nothing to do with Groenewald's disappearance. To his surprise, Swanepoel then admitted to some involvement in the disappearance and, after the respondent had requested Inspector Pietersen to leave the office so that Swanepoel could be alone to speak freely, Swanepoel confessed to the respondent that he and his brother had shot and killed Groenewald. Swanepoel again asked the respondent whether he would assist him in a bail application if he were to co-operate fully with the police as he was determined to reveal all and to make a clean breast of things. The respondent then furnished the advice set out in the charge above.

(d) On the following day Swanepoel made a pointing out of the deceased's body to the police and made a full confession before a magistrate.

[5] As is evident from the charge, in essence, the respondent was alleged to have acted unprofessionally in failing to advise Swanepoel of his right to remain silent when he furnished the advice as set out above. The charge was formulated on the basis of the respondent's written response to Swanepoel's complaint and, as stated, the disciplinary committee's finding was also premised on that document. In his written response, the respondent set out in full the background to and the context in which the advice was furnished to Swanepoel. That background and context was correctly accepted by the disciplinary committee and the high court as the basis upon which the matter fell to be decided. Before dealing with the merits, it is useful to consider briefly the legislative framework that bears upon disciplinary proceedings.

[6] Section 71(1) of the Act authorises the council of a Law Society to inquire into cases of alleged unprofessional or dishonourable or unworthy conduct on the part of an admitted attorney, notary or conveyancer. Sections 71(2), (3) and (4) set out the procedure to be followed at an enquiry. It bears the hallmarks of civil proceedings but, for the reasons that follow later, contrary to the high court's finding disciplinary proceedings under the Act are not ordinary civil proceedings, but are rather sui generis in nature. Section 72 deals with a council's disciplinary powers, while s 73 details the steps to be taken by a practitioner who wishes to appeal against a finding of guilty.

[7] Significantly, neither the Act nor the appellant's rules list acts or omissions which would constitute unprofessional, dishonourable or unworthy conduct. The now repealed Law Society (Cape of Good Hope) Private Act 20 of 1916 contained such a list of offences in clause 42 of its rules and Regulations. Notwithstanding its repeal, s24(2)(*a*) of Act 41 of 1975 has preserved all rules, by-laws and regulations made under Act 20 of 1916. Thus all rules and regulations made under Act 20 of 1916 have been subsumed into the second schedule of Act 41 of 1975. Clause 42 states that 'unprofessional or dishonourable or unworthy conduct on the part of an attorney, notary or conveyancer shall include, *inter alia* . . .' and it proceeds to list numerous

instances. Included in the list are amongst others touting, withholding the payment of trust money without lawful excuse, assisting, allowing or enabling an unqualified person to perform the work of an attorney, notary of conveyancer for remuneration, opening an office without continuous personal supervision of a practitioner and so forth.[3] It is not decisive but nevertheless noteworthy that conduct of the kind under discussion is not contained in the list'.

[8] It is self-evident that a charge against a legal practitioner in a disciplinary enquiry must be formulated with adequate particularity to enable that legal practitioner to answer the charge and the enquiry must be restricted thereto.[4] It also follows that a council which initiates a disciplinary enquiry is bound by the charge/s which it prefers against a legal practitioner.[5] In the present matter the appellant elected to frame the charge in the manner set out above. The following facts are germane to an enquiry as to whether the advice furnished by the respondent, in the terms set out in the charge, constitutes an offence as charged:

(a) Swanepoel was under police arrest as a suspect in Goenewald's disappearance;

(b) Despite having first professed to the respondent his innocence in respect of that disappearance, he subsequently expressed his intention to tell all and to make a clean breast of things at the stage before he sought the respondent's advice;

(c) Swanepoel sought the respondent's advice in respect of the possible advantage or otherwise of full co-operation with the police in an envisaged bail application.

[9] Against the background of these salient facts and circumstances the question which arises is whether it was unprofessional, dishonourable or unworthy conduct on the respondent's part to have neglected to inform

[3] The list is not exhaustive.
[4] *Reyneke v Wetsgenootskap van die Kaap Die Goeie Hoop* 1994 (1) SA 359 (A) at 368C-H.
[5] Ibid, see also *Incorporated Law Society of the OFS v H* 1953 (2) SA 263 (O) at 264H-265A.

Swanepoel of his right to remain silent in the circumstances of this case. I think not. Swanepoel was firmly of the intent to tell all – he had intimated as much to the respondent. The idea to co-operate fully and to reveal all came not from the respondent but from Swanepoel. In these circumstances it is not our task to judge whether the advice was inadequate or incomplete. What falls to be determined is whether any shortcoming can be categorized as unprofessional, or dishonourable or unworthy conduct. The question whether the rendering of inadequate advice can generally amount to professional misconduct is not an issue before us.

[10] I have alluded in paragraph 6 above to the fact that neither the Act nor the rules list acts or omissions that constitute unprofessional, dishonourable or unworthy conduct. But the appellant's rules do set out general principles of professional conduct in rule 14.3, non-compliance with which renders a member guilty of unprofessional and/or dishonourable and/or unworthy conduct (rule 14.2). In order to avoid prolixity, I do not propose burdening this judgment with an exposition of these general principles. It is sufficient to state that they are of the kind to be expected of an attorney as an officer of the court. The principle which seems to me to be most suited to the present case is rule 14.3.8 which requires attorneys to 'retain the independence necessary to enable them to give their clients unbiased advice'. But it bears emphasis that this is not what the respondent had been charged with. He was charged with a contravention of rule 14.3.14 which requires attorneys' to 'refrain from doing anything which could or might bring the attorneys profession into disrepute'. This charge, substantiated in the charge as set out above, does not bear scrutiny in the light of common cause facts and contextual background. In summary – the respondent's failure to advise Swanepoel of his right to remain silent cannot be said to have brought the attorneys' profession into disrepute, given the fact that Swanepoel was fully committed to telling all and to co-operating fully with the police.

[11] The high court approached the matter along different lines. It is not necessary to deal with its wide ranging findings save for two important aspects, namely its finding that the disciplinary proceedings constitute civil proceedings and its statements concerning the admissibility of evidence. Counsel for the appellant expressed his client's concern with regard to the possible future impact of those particular findings. It is only proper that this court deals with these aspects. After finding that the proceedings before the disciplinary committee constituted civil proceedings, the high court applied the so-called rule in *Hollington v Hewthorn*[6] in ruling that the disciplinary committee had erred in placing reliance on this Court's earlier judgment in the criminal appeal in its reasons for finding the respondent guilty. The high court erred in several respects in this regard. First, disciplinary proceedings under the Act are not civil proceedings, but sui generis in nature.[7] They may bear features of civil proceedings, but that does not qualify them as civil proceedings. So, for example, some of the provisions in the Act relating to the procedure in a disciplinary enquiry contain references apposite to civil court proceedings (a fact which the high court relied heavily on), such as s 71(2)(b), (c) and (d) and s 73 (4).

[12] In *Middelberg v Prokureursorde, Transvaal*[8] Smalberger ADCJ undertook a full analysis of the nature of an application to strike an attorney off the Roll, with a view to determining whether leave to appeal is necessary for the matter to serve before this court. The learned Judge of Appeal concluded that such proceedings are sui generis, but for purposes of s 20(1) and (4) of the Supreme Court Act 59 of 1959 (which concerns appeals to this court and when leave to appeal to it is required) they constitute civil proceedings:

'Na my mening is die aansoek om die skrapping van 'n persoon van die rol van prokureurs, indien nie in alle opsigte 'n gewone siviele verrigting. . . nie vanweë die

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[6] *Hollington v F Hewthorn & Company Ltd* [1943] 1 K.B. 587 (CA); 1943 ALL ER 35.
[7] *Malan & another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) at par 12, the latest in a long line of judgments from this court, commencing with *Solomon v Law Society of the Cape of Good Hope* 1934 AD 401 at 408, to this effect.
[8] *Middelberg v Prokureursorde, Transvaal,* 2001 (2) SA 865 (SCA)

sui generis aard daarvan, nogtans ‘n siviele verrigting vir die doeleindes van art 20(1) en (4) van die Wet [op Hooggeregshowe]’.[9]

[13] The second misdirection, which flows from the first, is that the so-called rule in *Hollington v Hewthorn* applied. It did not. And the third misdirection is linked to the previous two. The high court misconstrued the disciplinary committee’s reasoning. The committee did not rely on this Court’s findings in the criminal appeal, it merely associated itself with this Court’s views on the common cause facts. A brief explanation is necessary. Swanepoel and his brother appealed against their convictions to this Court. They were unsuccessful. In his judgment,[10] Mthiyane JA (Combrinck and Malan AJJA concurring) found that a conflict of interest existed on the respondent’s part when he furnished the advice in question to Swanepoel and that his failure to advise Swanepoel of his right to remain silent effectively left Swanepoel without representation. This court also found, however, that the respondent had acted bona fide. In its written reasons the disciplinary committee quoted an extract from the judgment relating to the findings set out above and proceeded to state that:

‘Having regard to the [above], the Committee is of the view that it was correctly conceded by the member that in fact he had not advised the accused of his right to remain silent and had also placed himself in a position of a conflict of interest. The last mentioned issue was not before the Committee and it was therefore unnecessary to deal with it.’

There can hardly be any quarrel with this approach. It does not signify reliance on this court’s judgment at all. The only other instance where the disciplinary committee makes reference to this court’s judgment is in respect of the sanction, something obviously not relevant to the merits. The high court found this court’s judgment to have been inadmissible as evidence against the respondent based on the rule in *Hollington v Hewthorn*. As pointed out above, this is a complete *non sequitur*.

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[9] At par 15.

[10] *D H Swanepoel v The State* (42/06) [2006] ZASCA 143; [2006] SCA 171 (RSA) (1 December 2006).

[14] In the premises the appeal must fail and the high court's order must be upheld, albeit for different reasons.

The appeal is dismissed with costs.

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S A MAJIEDT

JUDGE OF APPEAL

APPEARANCES:

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