



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 246/2015

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES

APPELLANT

and

FREDERICK KYLE

RESPONDENT

Neutral citation: *Law Society of the Northern Provinces v Kyle* (2015) [2016]
ZASCA 120 (19 September 2016)

Bench: Navsa, Cachalia, Petse, Willis and Saldulker JJA

Heard: 25 August 2016

Delivered: 19 September 2016

Summary: Attorney: Section 22(1)(d) of Attorneys Act 53 of 1979 : misconduct : appropriate sanction : court a quo misdirecting itself in the exercise of its discretion : attorney suspended from practice until such time as he satisfies the court that he is a fit and proper person to resume practice as an attorney.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Hughes and Louw JJ sitting as court of first instance).

1. The appeal is upheld with costs on the attorney and client scale.
2. The order of the court below is confirmed, save for paragraph 2 of that order, which is set aside and replaced with the following:

'2. The respondent, Frederick Kyle, is suspended from practising as an attorney of this court until such time as he satisfies the Court that he is a fit and proper person to resume practice as an attorney.'

JUDGMENT

Saldulker JA (Navsa, Cachalia, Willis and Petse JJA concurring):

[1] This is an appeal by the Law Society of the Northern Provinces (the Law Society) against a judgment and order of the Gauteng Division of the High Court, Pretoria (Hughes J, Louw J concurring), in terms of which the respondent, Mr Frederick Kyle, was suspended from practicing as an attorney for a period of six months. The appeal is with the leave of the court below. It is necessary to record that an application for leave to appeal by Mr Kyle in the court below was unsuccessful. However, the application by the Law Society to cross-appeal was granted, hence the present appeal.

[2] Mr Kyle did not file heads of argument and was not present at the hearing of this appeal. I record that the Registrar, after a notice of withdrawal by Mr Kyle's

former legal representatives, took the necessary steps to inform him of the date of the hearing of the appeal.¹ We were informed from the Bar by counsel on behalf of the Law Society that their investigations had revealed that he was currently practicing in the KwaZulu-Natal Province.

[3] Mr Kyle was admitted as an attorney on 4 September 2006 and initially practised as a partner and director of Botes, Jafta, Kyle Incorporated. On 20 February 2008 he left the aforesaid firm and commenced practicing for his own account from 25 February 2008 under the name and style of Kyle Attorneys. During July 2012, Mr Kyle ceased practising as an attorney and established a company known as Beryl Holdings, of which he was the managing director. It appears that the company was unsuccessful and that Mr Kyle considered returning to practise as an attorney.

[4] After receiving a complaint to the effect that Mr Kyle had failed to account to clients in respect of his trust account, the Law Society decided to conduct an inspection of his accounting records and practice. The inspection was due to be conducted by a chartered accountant and auditor (Mr Deleeuw Swart). According to the Law Society, the inspection was not satisfactorily concluded because of what is set out hereafter.

[5] Mr Kyle did not have updated accounting records and requested time to arrange for this to be done, and undertook to present them to the Law Society when they became available. That undertaking was not honoured. The Law Society took the view that this clearly demonstrated that Mr Kyle failed to keep proper accounting and supporting records and that this constituted a contravention of its rules² and the relevant provisions of the Attorneys Act 53 of 1979 (the Attorneys Act).

¹ On 27 May 2016 the Registrar of this court received a Notice of Withdrawal as attorneys of record from Mr Kyle's erstwhile attorney. On 28 May 2016 the Registrar informed Mr Kyle (via e-mail) that this appeal was set down for hearing on 25 August 2016. Thereafter, the Registrar attempted to contact Mr Kyle at his last known e-mail address and telephonically in order to inform him of the date of the hearing of this appeal, but to no avail.

² The Rules applicable at the time were the Rules of the Law Society of the Northern Provinces, GG 7164, 1 August 1980, as amended. It must be noted, however, that these Rules have as from 1 March 2016 been repealed and replaced with a standardised set of rules for all the law societies. See Rules for the Attorneys' Profession, GN 2 of 2016, GG 39740, 26 February 2016.

[6] During his interaction with the Law Society, Mr Kyle undertook to provide outstanding auditor's reports and to resolve the question of outstanding Fidelity Fund certificates for the period 2009 to 2013. Mr Kyle also failed to furnish the Law Society with his practice's latest trust account bank statement. All of these, according to the Law Society, constituted transgressions of its rules and contraventions of the Attorneys Act.

[7] During 2011 the Law Society received further written complaints from Mr Kyle's former clients. The first complained that he had failed to account for monies collected on his behalf. The second complained that Mr Kyle had defaulted in repaying a loan.

[8] The Law Society also received complaints from counsel who alleged that they had not been paid by Mr Kyle, as well as a similar complaint from an attorney.

[9] Furthermore, the Law Society was concerned about Mr Kyle's failure to register as an 'accountable institution' with the Financial Intelligence Centre in terms of s 43B of the Financial Intelligence Centre Act 38 of 2001.³ This registration was required to have been completed by 1 March 2011.⁴ Section 45(1) of the Financial Intelligence Centre Act provides:

'Every supervisory body is responsible for supervising and enforcing compliance with this Act or any order, determination or directive made in terms of this Act by all accountable institutions regulated or supervised by it.'

In terms of the provisions of section 45(1B)(a) of the Act a supervisory body may:

'(a) In addition to any powers it has in terms of another Act, exercise any power afforded to it in this Act.'

The Attorneys' Act is such other Act.

[10] In 2013 the Law Society wrote to Mr Kyle calling upon him to comply with his undertakings set out above. In his written response he accused the Law Society of an abuse of power and of unjustifiably maligning him.

³ Section 43B(1) reads:

'(1) Every accountable institution referred to in Schedule 1 and every reporting institution referred to in Schedule 3 must, within the prescribed period and in the prescribed manner, register with the Centre.'

⁴ In terms of reg 27A of the Money Laundering and Terrorist Financing Control Regulations, GN R1595 of 2002, GG 24176, 20 Dec 2002.

[11] Following on the history set out above, the Law Society resolved to apply to the court below for an order suspending Mr Kyle from practice and sought associated orders, including the appointment of a curator bonis to administer and control his accounts.

[12] On 22 April 2014 the Gauteng Division of the High Court, Pretoria, granted an interim order for Mr Kyle's suspension. Before the return day, Mr Kyle filed answering affidavits. It is necessary to state at the outset, as recorded by the court below, that Mr Kyle's opposition to the application as contained in his answering affidavit was based mainly on technical points, namely, the denial of the existence and status of the Law Society as well as calling into question the identity and authority of the principal deponent on its behalf and questioning the validity of the resolution on which the application was based.

[13] Mr Kyle's answering affidavit contains no substantive answers to the allegations by the Law Society that he did not keep proper books of account and did not account to clients. The complaints received by the Law Society were not dealt with on their merits.

[14] The technical points referred to in para 12 were abandoned by Mr Kyle, who represented himself, in the court below. The court below said the following (para 11): '[I]t is evident that the points raised by the respondent, were disingenuous, without merit and would have been rejected by this court, had the respondent not made the concessions he did which culminated in the abandonment of these points.'

[15] In relation to the allegations concerning Mr Kyle's misconduct, the court below had regard to s 22(1)(d) of the Attorneys Act, which provides that a person who has been admitted and enrolled as an attorney may on the application of the Law Society be struck off the roll or suspended from practice if he or she, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney. The learned judges correctly stated that applications of the kind brought by the Law Society comprised a three-stage enquiry, namely;

- (a) the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities; if so
- (b) it must decide in its discretion whether the person concerned is a fit and proper person to practise as an attorney and this requires a value judgment; and if not
- (c) the court must in its discretion, which involves yet again a value judgment, determine whether the attorney should be merely suspended for a period or whether the attorney should be removed from the roll.⁵

[16] Dealing with the complaint concerning the lack of a Fidelity Fund certificate, the court below had regard to s 41(1) of the Attorneys Act which reads as follows:

‘A practitioner shall not practise or act as a practitioner on his or her own account or in partnership unless he or she is in possession of a fidelity fund certificate.’

The court noted that a certificate is obtained after compliance with s 42(3)(a) of the Attorneys Act, which dictates that a practitioner must make an application, which must be accompanied by a contribution of the necessary fee payable.

[17] Before the court below, Mr Kyle relied on the unreported judgment of the Gauteng Division, Pretoria in *Law Society of the Northern Provinces v Frederick Simon Botes and Frederick Kyle*, case no 70743/0, where the Law Society’s case in regard to his failure to obtain a Fidelity Fund certificate was dismissed. The court below took into account that the application in that case concerned Mr Kyle whilst he still practised under the style Botes, Jafta, Kyle Incorporated, and that it concerned the periods 2009 and 2010. On the basis of the findings in that case, the court below refused to entertain the Law Society’s complaint in respect of those years.

[18] The court below then turned to the periods 2011 to 2012. Mr Kyle’s failure to submit unqualified audit reports in terms of Rule 70 of the Law Society’s Rules had resulted in him not being issued with a Fidelity Fund certificate by the Law Society. The court below rightly rejected the submission by Mr Kyle that the Law Society did not have the necessary authority to seek compliance from him by requesting that he

⁵ See in this regard *Malan & another v Law Society, Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 (SCA), para 4.

submit accounting reports in terms of Rule 70. In this regard it considered the provisions of s 42(1) of the Attorneys Act, which are clear and read as follows:

‘A practitioner practising on his or her own account or in partnership, and any practitioner intending so to practise, shall apply in the prescribed form to the secretary of the [law] society concerned for a fidelity fund certificate.’

[19] The court below also took into account s 59(k) of the Attorneys Act, which gives the Law Society the power to do anything necessary for or conducive to the attainment of its objects. It had regard to the criminal sanction provided for in s 83(10) of the Attorneys Act, where an attorney practises without a Fidelity Fund certificate.⁶

[20] The following part of the court’s judgment is of relevance in the present appeal (para 33):

‘On the facts, set out above it is not even necessary to deal with the other complaints advanced by the applicant. The facts clearly illustrate that the respondent did not practise with a certificate in 2011 and 2012. The gravity of this deviation in terms of the statutes is sufficient for this court to confirm the *rule nisi* issued on 22 April 2014.’

It went on to make the following order:

- ‘1. THAT the Rule Nisi granted on 22 April 2014 is hereby confirmed.
2. THAT the respondent, Frederick Kyle, is suspended from practising as an attorney of this court for a period of six months from 10 October 2014.
3. THAT prayers 2 to 12, inclusive of their sub paragraphs, as is set out in the notice of motion dated 17 October 2013 (Annexed as A) are hereby granted.⁷
4. THAT the respondent is ordered to pay the costs on an attorney and client scale.’

[21] Before us, it was contended on behalf of the Law Society that the court below erred in not considering:

⁶ Section 83(10) provides:

‘Any person who directly or indirectly purports to act as a practitioner or to practise on his or her own account or in partnership without being in possession of a fidelity fund certificate, shall be guilty of an offence and on conviction liable to a fine not exceeding R2 000 or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.’

⁷ Prayers 2 to 12 related inter alia to a curator bonis being appointed, Mr Kyle surrendering his certificate of enrolment as an attorney, being prohibited from handling or operating his trust accounts, being required to deliver his accounting records and files to the curator, and being removed from office as executor of any estate or trustee of any insolvent estate.

- (a) Mr Kyle's failure to supply auditor's reports for the periods ending 28 February 2011 and 29 February 2012;
- (b) his failure to comply with Financial Intelligence Centre Act requirements;
- (c) his contravention of several requirements of the Attorneys Act and the Law Society's Rules, and
- (d) the unanswered complaints against Mr Kyle to the effect that he had failed to account to clients, delayed the payment of trust finds, failed to give proper attention to the affairs of clients and failed to pay the fees of advocates and legal practitioners within a reasonable time. It cannot be emphasised enough that the complaints were not responded to by Mr Kyle. Thus, they remain unchallenged.

It was correctly contended by the Law Society that what is set out above, was not in dispute as they were either common cause or not addressed at all by Mr Kyle in his answering affidavit.

[22] It is necessary to consider briefly the relevant rules of the Law Society (as they applied at the time) and the relevant provisions of the Attorneys Act. Rule 68 deals with accounting matters, and, inter alia, required that proper accounting records be kept. It also required an attorney to account to his client within a reasonable time after the performance of his or her mandate, and pay any amount due within a reasonable time. Rule 89 dealt with the required standard of conduct of an attorney, and, inter alia, required an attorney to give proper attention to the affairs of his clients and to comply with a lawful requirement or request from the council of the Law Society. Section 70 of the Attorneys Act empowers a Law Society to direct any practitioner to produce any book, document or records in his or her possession and the refusal to comply with such a direction constitutes unprofessional conduct. Section 78(1) of the Attorneys Act requires an attorney to keep a separate trust banking account into which shall be deposited money held or received on account of any person. Section 78(4) provides that a practitioner shall keep proper accounting records of a trust account. The Law Society is empowered in terms of s 78(5) to inspect the accounting records to satisfy itself that the provisions of ss 78(1) to (4) are being observed.

[23] It was submitted on behalf of the Law Society that, in addition to the transgressions referred to above, the manner in which Mr Kyle conducted himself in

relation to the proceedings in the court below was reprehensible and deserving of sanction. In this regard, the technical points raised in relation to the Law Society and its office bearers were referred to. Counsel on behalf of the Law Society relied on a judgment of this court in *Law Society, Northern Provinces v Mogami & others* [2009] ZASCA 107; 2010 (1) SA 186 (SCA), para 26:

‘It has become a common occurrence for persons accused of a wrong doing, instead of confronting the allegation, to accuse the accuser and seek to break down the institution involved. This judgment must serve as a warning to legal practitioners that courts cannot countenance this strategy. In itself it is unprofessional.’

[24] I agree with counsel on behalf of the Law Society that a more serious sanction than that imposed by the court below was called for. The court below erred materially by not taking into account all of the other transgressions referred to above. The statement by the court that it is not even necessary to deal with the other complaints is a serious misdirection. It is the compounding effect of all the transgressions that play a material part in the sanction that should be imposed. Mr Kyle acted in disregard of his clients’ best interests, failed to observe the most fundamental rules relating to the keeping of accounting records, did not heed the regulatory directions of the Law Society, did not pay counsel and an attorney, failed to comply with Financial Intelligence Centre Act requirements and behaved deplorably when faced with his own bad behaviour. I also agree that what was called for was a clear finding that Mr Kyle was not a fit and proper person to continue practice. In *Malan & another v Law Society, Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 (SCA) the following was said (para 8):

‘It is seldom, if ever, that a mere suspension from practice for a given period in itself will transform a person who is unfit to practise into one who is fit to practise. Accordingly, as was noted in *A v Law Society of the Cape of Good Hope* 1989 (1) SA 849 (A) at 852E-G, it is implicit in the Act that any order of suspension must be conditional upon the cause of unfitness being removed. For example, if an attorney is found to be unfit of continuing to practice because of an inability to keep proper books, the conditions of suspension must be such as to deal with the inability. Otherwise the unfit person will return to practice after the period of suspension with the same inability or disability.’

Because of the material misdirections referred to above we are at large to interfere with the sanction imposed by the court below. In light of all of the serious transgressions by Mr Kyle, an appropriate sanction is for him to be suspended from

practice until such a time as he satisfies the court that he is once again fit and proper to resume practice.

[25] Given that Mr Kyle is reportedly currently practising as an attorney in Kwazulu-Natal, the Registrar of this court will be instructed to serve a copy of this judgment on the KwaZulu-Natal Law Society.

[26] For the reasons aforesaid, the following order is made:

1. The appeal is upheld with costs on the attorney and client scale.
2. The order of the court below is confirmed, save for paragraph 2 of that order, which is set aside and replaced with the following:
 - '2. The respondent, Frederick Kyle, is suspended from practising as an attorney of this court until such time as he satisfies the Court that he is a fit and proper person to resume practice as an attorney.'

HK Saldulker
Judge of Appeal

APPEARANCES:

Counsel for the Appellant: P J Smith
Instructed by Rooth & Wessels Inc, Pretoria
Phatsoane Henney, Bloemfontein

Counsel for the Respondent: No appearance