THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 341/2012
Reportable

In the matter between:

THE LAW SOCIETY OF THE CAPE OF GOOD HOPE **APPELLANT**

and

MICHAEL WHARTON RANDELL **RESPONDENT**

Neutral citation: *Law Society of the Cape of Good Hope v MW Randell* (341/2012) [2013] ZASCA 36 (28 March 2013)

Coram: Mthiyane DP, Majiedt JA and Van der Merwe, Swain and Mbha AJJA

Heard: **21 February 2013**
Delivered: **28 March 2013**

Summary: Application for stay of civil proceedings pending finalisation of criminal proceedings ─ nature of discretion vesting in the court to grant stay ─ accused not compelled to make statement in civil proceedings ─ right to remain silent not violated ─ prejudice justifying intervention not shown.

ORDER

On appeal from: Eastern Cape High Court, Grahamstown (Smith J sitting as court of first instance):

The appeal is upheld with costs on an attorney and client scale, and the order of the court a quo is set aside and replaced with the following.

'The application is dismissed with costs on an attorney and client scale.'

JUDGMENT

MTHIYANE DP (MAJIEDT JA AND VAN DER MERWE, SWAIN AND MBHA AJJA.CONCURRING)

[1] The respondent, Michael Wharton Randell, is a duly admitted attorney of the high court practising as such in Port Elizabeth. He is currently facing charges of fraud and theft involving a sum of R2,4 million which he together with two other persons are alleged to have misappropriated while they were trustees of the Greenwood Property Trust (the Trust), the sole beneficiary of which was the Greenwood Primary School, Port Elizabeth (the school). The criminal proceedings against the respondent are still pending.

[2] Prior to the disposal of the criminal proceedings of the appellant, the Law Society of the Cape of Good Hope, launched an application in the Eastern Cape High Court for the removal of the respondent's name from the roll of attorneys. The application is based on the same facts which are the subject of the criminal proceedings pending against the

respondent in the Commercial Crimes Court in Port Elizabeth. Without filing an answering affidavit in opposition to the application to strike him off, the respondent launched a counter application for a stay of the striking off application, pending the disposal of the criminal proceedings.

[3] The question arising in this appeal is whether the court below was entitled to grant a stay of the civil proceedings, even though there was no compulsion on the respondent to file an answering affidavit in opposition to the striking off application. There is a further aspect to be considered and it is the question whether the respondent proved that he will suffer prejudice if he made a sworn statement in opposition to the striking off application. The appeal is with leave of the court below.

[4] A brief history of the matter is necessary to put the legal and factual issues in this case in proper context. The respondent was one of the three trustees of the Trust which was established in 1999. The sole beneficiary of the trust, was as I have said, the school.

[5] In 1999 the Trust purchased land and buildings adjacent to the school (the property) for a consideration of R500 000. The Trust in turn leased the property to the school and the rental was used to cover instalments on the mortgage bond finance provided by the Standard Bank.

[6] During the period March 2005 to August 2005 the trustees amended the trust deed and established themselves as trust beneficiaries.

[7] On 21 April 2006 the trust sold the property to a developer for R3,5 million, the developer also agreeing to fund the erection of a facility on the school's grounds to the value of R1,5 million.

[8] On 27 June 2006 the trustees met and resolved that R2,4 million of the purchase price was to be distributed to the respondent and the other trustees.

[9] Mr S C Kapp, a chartered accountant and partner of Mozars Moores Rowland, the auditors of the school and the accountants of the trust, queried this transaction and when he did not receive what he considered to be a satisfactory explanation he concluded that the trustees had misappropriated the sum of R2,4 million. A further unsatisfactory feature in his view was the amendment of the trust deed by the respondent and his co-trustees, the appointment of themselves as the additional beneficiaries, the amount of the purchase consideration and the distribution of R2,4 million amongst themselves, all of which took place without the knowledge of the school's governing body. Mr Kapp decided to report the matter to the police and the respondent was as a consequence duly charged for fraud and theft.

[10] In the light of the above facts the appellant concluded that the respondent had made himself guilty of dishonourable, dishonest and disgraceful conduct which was of such a nature that he was not a fit and proper person to continue practising as an attorney. In terms of its obligation under s 22(1)*(d)* of the Attorneys Act 53 of 1979, the appellant launched an application for the removal of the respondent's name from the roll of attorneys.

[11] It is these proceedings that the respondent sought to have postponed pending the finalisation of the criminal proceedings against him. He submitted that by making a sworn statement in advance of the criminal proceedings he might be prejudiced and his right in terms of s 35(1)*(c)* of the Constitution, not to be compelled to make any confession or admission that could be used in evidence against him, might be violated. He also claimed that he was entitled to remain silent pending the finalisation of the criminal trial and that his right to do so under s 35(1) *(a)* of the Constitution would be compromised.

[12] The respondent's contentions found favour with Smith J. In granting a stay of the application the learned judge cited the general principle articulated by Corbett J in *Du Toit v Van Rensburg* 1967 (4) SA 433 (C) at 435H, which is to the following effect:

'. . . [W]here civil proceedings and criminal proceedings arising out of the same circumstances are pending against a person it is the usual practice to stay the civil proceedings until the criminal proceedings have been disposed of.'

In the judge's view '[t]he principle at the root of this practice is that the accused might be prejudiced in the criminal proceedings if the civil proceedings were heard first'. He disagreed with the approach adopted in *Davis v Tip NO* 1996 (1) SA 1152 (W). After alluding to the principle at the root of the practice of staying civil proceedings until the criminal proceedings had been disposed of in certain circumstances, the judge said the court has only to be satisfied that there is a danger that the accused person might be prejudiced in the conduct of his defence. He stated that the 'qualification that there must be an element of state compulsion before a court can stay civil proceedings under these circumstances, was superimposed for the first time in the *Davis* case'. I do not agree. In my view the golden thread that runs through the previous cases that were

considered in *Davis* (*Du Toit*; *Irvin & Johnson Ltd v Basson* 1977 (3) SA 1067 (T); *Kamfer v Millman & Stein NNO* 1993 (1) SA 122 (C)) to mention just a few) is that they all involved sequestration proceedings, in which the examinee respondent was required to subject himself or herself to interrogation or to answer questions put to him or her by the provisional trustee. Clearly in each one of those cases there was an element of compulsion because s 65 of the Insolvency Act prior to its amendment provided that the person concerned was not entitled to refuse to answer questions. The examinee's position was only ameliorated by the intervention of the court in the exercise of its discretion which in most cases involved directing that the examinee should not be interrogated (*Gratus & Gratus (Prop) Ltd v Jackelow* 1930 WLD 226 at 231). This is how the general principle was applied long before *Davis*. The element of compulsion is not something that was introduced or superimposed by the decision in *Davis*.

[13] The approach adopted by the court below is, with respect, erroneous in two important respects. The first involves its broad formulation of the general principle applied in determining whether a stay should be granted where civil and criminal proceedings arising out of the same circumstances are pending against a person and there is a likelihood of prejudice to the person concerned if he or she made a statement prior to the disposal of the criminal proceedings. On the approach adopted by the court below, the power to grant a stay under these circumstances would be unlimited. One would envisage a situation where a stay will be refused because, as Nugent J correctly pointed out in *Davis*, civil proceedings invariably create the potential for information damaging to the accused person being disclosed by the accused person himself, not

least so because it will often serve his or her interests in the civil proceedings to do so.

[14] The second important respect in which the court erred is with regard to the application of the principle to the facts. In my view the respondent failed to show that he would be prejudiced if the application to strike him off the roll was proceeded with. I will deal more fully with this aspect later in the judgment.

[15] I turn now to the general principle, as it applies where there are both criminal and civil proceedings pending which are based on the same facts. The usual practice is to stay the civil proceedings until the criminal proceedings have been adjudicated upon, if the accused person can show that he or she might be prejudiced in the criminal proceedings should the civil proceedings be heard first. (*Du Toit* at 435H-436B; *Irvin & Johnson* at 1072H-1073B; *Kamfer* at 125E-126D; *Davis* at 1157B-E.

[16] A series of previous decisions in this connection have dealt with applications for a stay in the context of sequestration proceedings pending the determination of the criminal proceedings. In those cases the examinee respondent was obliged to submit to compulsory interrogation in terms of s 65 of the Insolvency Act and to answer questions put to him or her by the provisional trustee. The general approach of the courts in this regard was not to stay the sequestration proceedings, but rather to ameliorate the potential prejudice by directing that, pending the disposal of the criminal proceedings there should be no interrogation of the insolvent (see *Gratus* at 231). In *Gratus* the applicant had applied for sequestration of the estate of the respondent whom it had formerly employed as a clerk whilst criminal proceedings on a charge of theft were

still pending against him. The charge related to the money the respondent had allegedly stolen from the applicant. The respondent applied for a stay of the sequestration proceedings pending the finalisation of the criminal proceedings. He contended that any statement he made in the sequestration proceedings would seriously prejudice him in his defence at the criminal trial. The court refused to grant a stay of the sequestration proceedings but to avoid possible prejudice to the respondent, it ordered that he not be examined under the Insolvency Act or interrogated by the provisional trustee. One would then immediately realise that the court intervened to ameliorate any state compulsion that existed arising from the obligation on the part of the examinee respondent to answer questions put to him in the interrogation which was sought to be pursued under the Insolvency Act. This occurred long before the decision in *Davis*.

[17] Under s 65(2) of the Insolvency Act, compulsion flowed from the fact that the examinees could not decline to answer any question upon the ground that the answer would tend to incriminate them, or upon the ground that they were to be tried on a criminal charge and might be prejudiced at such trial by their answers. Their opposition was ameliorated by the subsequent amendment. Section 65(2A) now provides for some protection to persons under interrogation. The new section requires that part of the proceedings in which they are required to answer such questions should be held in camera and further that their answers to such questions should not be published. Prior to the amendment the information elicited at these proceedings had generally been admissible in subsequent criminal proceedings. It is for this reason that a practice developed whereby civil proceedings were stayed until criminal proceedings arising from the same facts had been disposed of. (*Du Toit* at 435H).

[18] In the present matter the respondent is under no compulsion to respond to the allegations in the striking off application. In this appeal we are requested to consider the question of how the court should deal with the situation where a party who faces criminal proceedings is called upon to answer allegations in related civil or disciplinary proceedings, without being compelled to do so. The party concerned may be faced with the choice of abandoning a defence to the civil or disciplinary proceedings or waive his right to remain silent. This is the position in which the appellant finds himself. In *Davis* the court had to consider a situation which is not dissimilar to what we are dealing with in the present matter. In that case there was no legal compulsion on the respondent to testify. The court held that the preservation of his rights lay entirely in his hands. The court had to consider an application to review a ruling by a chairperson of a disciplinary enquiry, refusing an application by an employee of the Johannesburg City Council for a stay of the disciplinary proceedings pending the final determination of the criminal charges of fraud and theft. The court upheld the chairperson's refusal to stay the disciplinary proceedings pending the determination of the criminal proceedings and dismissed the application for review.

[19] As I have said, Nugent J pointed out that civil proceedings invariably create the potential for information damaging to an accused person to be disclosed by the accused person himself, not least because it will serve his or her interest in the civil proceedings. He emphasised that where the courts have intervened, there has been a further element, which has been a potential for state compulsion to divulge information. He pointed out that even in those cases the courts have not generally suspended civil proceedings, but have in appropriate cases ordered that the element of compulsion should not be implemented. I have already

referred to how the court in *Gratus* refused to grant a stay of the sequestration proceedings but ameliorated the prejudice by directing that the respondent not be examined under the Insolvency Act or interrogated by the provisional trustee. (*Gratus* at 231.)

[20] The approach of Nugent J in *Davis* has been followed in a number of subsequent cases, eg *Fourie v Amatola Water Board* (2001) 22 ILJ C94 (LC); *Gilfillan t/a Grahamstown Veterinary Clinic v Bowker* 2012 (4) SA 465 (E); *Seapoint Computer Bureau (Pty) Ltd v McLoughlin & De Wet NNO* 1997 (2) SA 636 (W); *Nedcor Bank Ltd v Behardien* 2000 (1) SA 307 (C). In *Seapoint* Navsa J followed and applied the principle in *Davis* and stressed that in principle a party should be left to his or her choice as to how he or she conducts the civil proceedings. The learned judge pointed out that allegations in pending criminal investigations or proceedings, without indicators that state compulsion or coercive means are to be employed in the civil proceedings, are not sufficient to prove prejudice of a kind that will justify a stay (at 649H-I).

[21] In *Equisec (Pty) Ltd v Rodriguez & another* 1999 (3) SA 113 (W) Nugent J again had the opportunity to express himself on the subject. He was called upon to consider an application for a stay of sequestration proceedings until such time as the related criminal proceedings had reached finality. Alluding to the dilemma in which a party requesting a stay found himself, he remarked (at 115A-C):

‘Where a person is accused of having committed an act which exposes him to both a civil remedy and a criminal prosecution, he may often find himself in a dilemma. While on the one hand he may prefer for the moment to say nothing at all about the matter so as not to compromise the conduct of his defence in the forthcoming prosecution, on the other hand, to do so may prevent him from fending off the more immediate civil remedy which is being sought against us.

When he finds himself in that dilemma he might appeal to a court to resolve it for him, which is what has occurred in the case which is now before us.'

[22] The judge elaborated further as follows:

'There are two circumstances in which the first respondent will face the prospect of disclosing information which may be relevant to whether he has committed the offence with which he is now charged. (at 116A-E)

Firstly, he is called upon in these proceedings to answer the allegations made against him by the applicant in the founding affidavit if he is to avoid his estate being placed under a final sequestration order. There is, of course, no legal compulsion upon him to do so. Whether a court should intervene to relieve a person of the perhaps difficult choices he faces in that regard was considered by me in *Davis v Tip No and Others* 1996 (1) SA 1152 (W). . . . I see no reason to depart from the conclusion which was reached in those cases. In my view, the choice which the first respondent may face between abandoning his defence to the civil proceedings or waiving his right to remain silent (cf Templeman LJ in *Rank Film Distributors Ltd and Others v Video Information Centre and Others* [1982] AC 381, especially at 423D-G) does not constitute prejudice against which he should expect to be protected by a Court and I would not exercise my discretion in favour of the first respondent on those grounds alone.'

[23] In my view the approach in *Davis* is sound and does no more than reiterate the approach of the previous decisions; namely that a stay will only be granted where there is an element of state compulsion impacting on the accused person's right to silence. It is true that the judges in those cases do not specifically refer to compulsion but this is a matter of deduction made from the way the general principle was applied in matters which primarily involved sequestration proceedings. The development and formulation of the principle occurred in the context of sequestration proceedings. There is no authority to support the proposition that the principle is of application in ordinary civil proceedings not involving an

element of compelled response on the part of the party who seeks a stay of civil proceedings. Our courts have only granted a stay where there is an element of state compulsion.

[24] This also appears to be the approach in certain foreign jurisdictions. In *Jefferson Ltd v Bhetcha* [1979] 2 All ER 1108 (CA) at 1112-1113 the Court of Appeal in England dismissed an application by an accused person for the stay of civil proceedings for the recovery of moneys pending the finalisation of the related criminal proceedings. In dismissing the application the court emphasised that there was no established principle of law that if criminal proceedings were pending against a defendant in respect of the same subject matter, he or she should be excused from taking any further steps in the civil proceedings which might have the result of disclosing what his defence or is likely to be, in the criminal proceedings.

[25] *Jefferson* was followed in *R v BBC, x p Lavelle* [1983] 1 All ER 241 (QBD) at 255 where Woolf J stressed that there should be no automatic intervention by the court. The learned judge pointed out that while the court must have jurisdiction to intervene to prevent serious injustice occurring, it will only do so in very clear cases in which the applicant can show that there is a real danger and not merely notional danger that there would be a miscarriage of justice in criminal proceedings if the court did not intervene.

[26] In *V v C* [2001] EWCA Civ 1509, the court of appeal in deciding whether a stay of proceedings should have been granted because the privilege against self-incrimination constrained the defendant from putting forward a defence, pointed out that there was no absolute right for

a defendant in civil proceedings not to have judgment entered against him or her simply because the privilege against self-incrimination was raised. The court refused the appeal on the basis that there was no need for the stay. It held that the defendant was entitled to enjoy the privilege against self-incrimination but if he was to exercise it he would have to suffer the consequences in the civil proceedings.

[27] Turning to the facts of this case the judge in the court below proceeded from the assumption that prior to *Davis* the applicable legal principle was that where civil and criminal proceedings arising out of the same circumstances were pending, the civil proceedings had to be stayed and that the question of compellability was a later requirement introduced for the first time. He asserted that the element of compulsion was not required in *Du Toit* and that Corbett J considered the legal principle to be of application if there was likelihood that the accused person would be prejudiced.

[28] The interpretation and the application of the principle in *Du Toit* as articulated and applied by the judge a quo is, with respect, not entirely accurate. The question of compellability has always been regarded as a relevant factor in a court's approach to the determination of whether a real likelihood of prejudice has been established. In *Du Toit*, and so too in *Gratus* and other cases mentioned earlier, there was an element of compulsion. It is for that reason that Corbett J in *Du Toit* made an order that 'the examination or interrogation of the respondent in terms of the Insolvency Act shall not take place pending the finalising of the application for sequestration'. The object of crafting the order in those terms was to ameliorate the impact of the compulsion contained in s 65(2) (prior to its amendment), in terms of which the examinee respondent was

‘not entitled at such interrogation to refuse to answer any questions upon the ground that he is to be tried on a criminal charge and maybe prejudiced at such trial by his or her answers’. A similar example of intervention is also to be found in *Gratus* where in order to avoid possible prejudice to the respondent, the court ordered that he not be examined under the Insolvency Act or interrogated by a provisional trustee. Absent any compulsion under the relevant provisions of the Insolvency Act the courts in *Du Toit*, *Gratus* and the other cases I have referred to above, would have been slow to grant a stay of the civil proceedings.

[29] If the approach adopted in the court below is taken to its logical conclusion, in every case where civil and criminal proceedings are pending and there is a likelihood of prejudice, the court will be vested with unlimited jurisdiction to stay the civil proceedings until the criminal proceedings have been finalised, even where there is no compulsion on the part of the person concerned to disclose his or her defence ─ where the person concerned is faced with a ‘hard choice’.

[30] It seems to me that the nature of the discretion to be exercised by courts in cases such as this is very limited in scope and ambit. In *Davis* the discretion was described by Nugent J as follows (at 1157D-E):

‘Although the principle has been articulated in the language of a discretion, this may be misleading. I do not understand the decided cases to have held that a Court may direct the civil proceedings to continue even where it has been found that they may prejudice an accused person. On the contrary, it is clear that once the potential for prejudice has been established the Courts have always intervened to avoid it occurring. In that sense then it has no discretion.’

The judge pointed out further that the potential for prejudice is limited to cases where there is a further element present, namely ‘the potential for State compulsion to divulge information’. (at 1157F-G)

[31] I agree with the approach in *Davis*. I also think that to extend the court's intervention to cases where an applicant for a stay of the civil proceedings has a 'hard choice' to make, would bring the right to remain silent into disrepute. The ratio for the discretion being narrowly circumscribed is that a distinction must be maintained between the situation where an individual has the choice whether to testify (even though the alternatives over which he has a choice are equally unattractive) and where he is compelled to because a failure to do so attracts a penalty. (at 1158H-J). According to the decision in *Davis* this is necessary to ensure that the 'salutary principle', enshrined in the right to silence is not to be extended beyond its true province and thereby risk falling into disrepute (at 1158I-J).

[32] The respondent in this case falls outside the category of parties who are subject to compulsion to testify or to disclose their defence. He has a 'hard choice' to make as to whether he should respond to the allegations in the striking off application or face the consequences of not responding. In my view, the learned judge's broad formulation of the general principle applicable to applications for a stay was erroneous. The only prejudice the court below referred to was that 'making a sworn statement in opposition to the main application might serve to prejudice the respondent in the conduct of his defence in the criminal matter'. The respondent however denies any wrongdoing and if he were to respond, would in any event probably file an exculpatory statement. Any claim to violation of the respondent's right to silence appears to be illusory. On the papers the respondent has already disclosed essentials of his defence when he filed a plea in a related civil matter. Significantly he has not sought to stay those proceedings. I do not see how he could claim that

filing an answering affidavit in the striking off application would prejudice him.

[33] The matter is of huge public importance. The respondent is an officer of the court whose position requires scrupulous integrity and honour. He is facing grave allegations of dishonesty and impropriety. In assessing prejudice generally the judge a quo regrettably appears to have focused solely on the respondent's practice. He pointed out that there was no evidence of wrongdoing in the respondent's trust account. This appears to avoid the issue because probity and fitness to remain in office of an attorney does not depend solely on whether the attorney's trust account is intact. These are factors which the judge a quo should also have taken into consideration in the overall consideration of the question of prejudice. It was prejudice not only to the respondent that he had to consider but also the protection of the public interest. In failing to consider the above factors, the judge erred.

[34] Before concluding, I would like to refer to a further point made by the respondent's counsel during argument. Counsel submitted that the application for a stay of the striking off proceedings was interlocutory and therefore not appealable. The argument is without merit. The order by Smith J to stay the application to strike off was final in effect, in that it disposed of all the issues relevant to the said application. In any event, the contention advanced on the respondent's behalf is in conflict the decision of this court in *Clipsal Australia (Pty) Ltd v GAP Distributors* 2012 (2) SA 289 (SCA), in which an application to stay contempt proceedings was held to be appealable.

[35] In the result the appeal is upheld with costs on an attorney and client scale, and the order of the court a quo is set aside and replaced with the following.

‘The application is dismissed with costs on an attorney and client scale.’

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K K MTHIYANE
DEPUTY PRESIDENT

APPEARANCES

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