

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2015/13360

1. REPORTABLE: YES / NO

2. OF INTEREST TO OTHER JUDGES: YES/NO

3. REVISED

DATE

SIGNATURE

In the matter between:

MATTHYS GERHARDUS ROBERTS

Applicant

And

**THE GENERAL COUNCIL OF THE BAR OF
SOUTH AFRICA**

First Respondent

**THE CHAIRPERSON OF THE APPEAL TRIBUNAL
OF THE GENERAL COUNCIL OF THE BAR OF
SOUTH AFRICA**

Second Respondent

CAMERON PETER HUNT

Third Respondent

J U D G M E N T

LAMONT, J:

[1] The applicant has brought an application to review the decision of the Appeal Tribunal of the first respondent.

[2] The applicant and the third respondent are both members of the Society of Advocates of KwaZulu-Natal. (I hereafter refer to that entity as the KZN Bar.)

[3] The third respondent lodged a complaint against the applicant with the KZN Bar. The KZN Bar dealt with the complaint in terms of Rule 15 of the Rules relating to complaints and enquiries. The complaint was sent to the Complaints Sub-Committee. That Sub-Committee reported in due course that no further action should be taken arising out of the complaint and that recommendation was adopted by the KZN Bar.

[4] The third respondent objected that the Sub-Committee had not considered the third respondent's response to the complaint. The KZN Bar agreed that the third respondent's complaint should be considered afresh by a new Complaints Committee. That Complaints Committee investigated and in due course reported that in its view the applicant was not guilty of misconduct and that nothing further should be done about the complaint. The KZN Bar notified the third respondent of its decision in the following terms:

"The Council considered the report of the Sub-Committee and the voting members of Council unanimously adopted its recommendation that the explanation of Roberts SC should be accepted and that he should not be found guilty of misconduct and that nothing further should be done with regard to the complaint and the file relating to it should be closed."

It is apparent from the decision that the KZN Bar did no more than accept what had been proposed by its Sub-Committee. That proposal is contained in paragraph 19 of the report in the following terms:

"19. It is our view that Roberts' explanation should be accepted, that he is not guilty of misconduct and that nothing further should be done with regard to the complaint. The file relating to it should be closed."

[5] The third respondent applied for leave to appeal against the decision of the KZN Bar.

[6] The applicant accepts that the day after the third respondent applied for leave to appeal an application was transmitted to his chambers. He was on leave and the application did not come to his attention until 24th February

2014, a date after the application had been heard. In a letter dated 28th February 2014 the applicant stated:

- “4. *I was not given the opportunity to respond to the grounds of appeal. I would no doubt have responded if the GCB gave me an opportunity to do so.*
5. *By virtue of the fact that leave to appeal has now been granted, I trust that in future, before any decision is reached that I be given an opportunity to be heard.*
6. *The record of the KwaZulu-Natal Society given to me has not been properly prepared and I suggest that all the documents be placed in sequence before being presented to the committee.”*

It was common cause that the applicant did not make any input into the application for leave to appeal either by way of writing or by way of appearing. This is consistent with his not having had knowledge of the application.

[7] In due course the appeal came before a committee (the Appeal Tribunal) of the first respondent. The Appeal Tribunal committee was chaired by the second respondent. At the hearing of the appeal the applicant submitted that his rights had been affected when a decision was made as he had not been afforded an opportunity of dealing with the application for leave to the Appeal Tribunal inasmuch as same had not been brought to his attention and that the Appeal Tribunal did not in any event have jurisdiction as the appeal did not arise out of disciplinary proceedings.

[8] The submissions of the applicant seeking a dismissal were rejected. A ruling was made that the appeal be set down so that the merits could be determined. A further ruling was made that the procedure would be as set out in a letter dated 28th May 2014. (The procedure involved the leading of evidence, argument and a decision being made.)

[9] The applicant sought to review the decision on three bases:

9.1 He had not been afforded an opportunity to address the body hearing the application for leave to appeal.

9.2 The Appeal Tribunal did not have jurisdiction to hear the matter.

9.3 In the event of the above two arguments being unsuccessful then the procedure for the hearing set out by the Appeal Tribunal was not competent.

[10] In consequence of the view I have taken on the issue of jurisdiction it is not necessary for me to deal with the other two submissions.

[11] The rules of the first respondent provide:

“6. POWER

(a) *The Council shall have no jurisdiction over any constituent Bar or its members except to extend provided for in the three succeeding subsections.*

- (b) *The Council shall have the power to:*
 - (i) *hear and decide appeals by members of constituent Bars from decisions of those Bars in any disciplinary proceedings in respect of those members ...*
 - (ii) *hear and decide appeals by any complainant from decisions of a constituent Bar in any disciplinary proceedings in respect of members of such Bar;*
 - (iii) *...*
 - (iv) *...*
- (c)
 - (i) *the appeals provided for in paragraphs (b)(i), (b)(ii) and (b)(iii) shall only be heard after the appellant has exhausted the appeal procedure, if any, of a constituent Bar and is subject to the leave to appeal procedure provided for in paragraph (c)(ii);*
 - (ii) *the member concerned and the complainant concerned may ... apply for leave to appeal to the Council ...*
- (d) *[irrelevant to the issues]."*

[12] Jurisdiction is only conferred upon the first respondent to decide appeals by members of a constituent Bar in respect of disciplinary proceedings in respect of those members and to hear and decide appeals by a complainant from a decision of a constituent Bar in any disciplinary proceedings in respect of members of such Bar.

[13] Such appeals are only to be heard after the appellant has exhausted the appeal procedure of a constituent Bar and after the leave to appeal procedure provided has been followed.

[14] The question arises as to what constitutes disciplinary proceedings as for present purposes jurisdiction is only conferred upon the first respondent in respect of disciplinary proceedings. This requires a consideration of the KZN Bar rules.

[15] Rule 15 of the KZN Bar rules is the rule setting out what is to occur in respect of complaints and enquiries.

“15. RULES RELATING TO COMPLAINTS AND ENQUIRIES

- (a) *The Chairman may appoint any member to investigate a complaint against a member.*
- (b) *Any person so investigating shall be entitled, after informing the member of the complaint, to require the member whose conduct is being investigated to produce any books, records or documents with regard to or relevant to the investigation of the matter being investigation.*
- (c) *If, in the opinion of the member investigating, a proper investigation requires that he should have the assistance of any other member or members or any other person whatsoever, he may approach the Chairman with a view to obtaining the assistance of any person herein before referred to and, if so authorised, shall be entitled to obtain such assistance.*
- (d) *If the person so investigating is of the opinion that the member concerned ought to be charged with misconduct (including any breach of the Rules of Professional Conduct and Etiquette) he shall frame the charge which shall be submitted to the Council.*
- (e) *The Council shall thereupon decide whether the enquiry shall be conducted by the Council or by a committee of members of the Society. If the enquiry is to be conducted by a committee, the Council shall appoint the committee which shall consist of not less than 3 and not more than 5 members of the Society and the Chairman of such committee shall, where practicable, be a silk.*

- (f) *A committee to appointed shall have all the powers of the Council with regard to the conduct of the enquiry.*
- (g) *The enquiry shall be conducted in such a manner as the Council or the committee, as the case may be, shall direct.*
- (h) *If the member concerned is found guilty of the charge the Council or the committee may impose any penalty referred to in paragraph 9(e) of the Constitution.*
- (i) *If the enquiry is conducted by a committee any person found guilty may appeal to the Council in such manner and in accordance with such procedure as the Council may direct.”*

[16] The Chairman of the Bar may appoint a member to investigate a complaint made against a member. The appointed person is given various rights of access to books, records and documents and with leave can require the assistance of other members of the Bar. Once his investigations are complete he is required to consider the matter. If he forms the opinion that the member concerned ought to be charged with misconduct he shall frame the charge which shall be submitted to the Council. The Council is thereupon to decide whether the charge as framed by the appointed person should be enquired into.

[17] It is apparent from the Rule that there is a two stage enquiry.

- 17.1 There is a preliminary enquiry made by the appointed person. The appointed person might decide that a member should not be charged with misconduct and that is the end of the matter. There are no further steps provided for in the Rule.

The appointed person might decide that the member concerned ought to be charged in which case he is to frame the charge and submit it to the Council.

17.2 The second step is an enquiry once the Council after considering the report of the appointed person decides there should be such enquiry.

[18] At the stage of the preliminary enquiry there is no decision to take steps to discipline the member. There is only the appointment of an investigator. There are no disciplinary proceedings until the decision is made to prosecute. That decision is only made after conclusion (in a particular way) of the preliminary enquiry. The enquiry made by the person appointed to investigate is preliminary to that step and independent of it.

[19] It was suggested that a way to test whether or not a particular enquiry constitutes disciplinary proceedings is to look at the rights of a person who complained and whose complaint did not result in the Bar deciding to prosecute. Such person has no remedy on the construction I have placed on the Rule. The submission was made that as that position is unacceptable that disciplinary proceedings commence when what I have called the preliminary enquiry commences. I do not believe this is an appropriate test. The test in my view is established by an interpretation of the Rule in accordance with the well-established principles of interpretation.

[20] In my view

- (1) disciplinary proceedings do not commence until a decision is made that they do,
- (2) the procedure of a preliminary enquiry is useful and sensible as it separates complaints that merit further attention from those that do not,
- (3) the preliminary enquiry is routinely triggered by a complaint. If this enquiry constitutes disciplinary proceedings the effect is that a member institutes the disciplinary proceedings potentially against the will of the Bar Council.
- (4) the fact that the report emanating from the prelim enquiry is considered by the Bar Council does not convert the nature of the preliminary enquiry into disciplinary proceedings.
- (5) pending disciplinary proceedings affect the member who is the subject of them. On the construction that the preliminary enquiry constitutes disciplinary proceedings the proceedings would pend immediately the complaint was lodged; the rights of the member to be heard would be ignored; no charge would have been laid; the member would not know that he is subject to

such proceedings; the Bar Council would not have decided there should be disciplinary proceedings.

[21] I am of the view that the Appellants Tribunal assumed a jurisdiction it does have and that for that reason the orders it made must be set aside.

[22] I express my gratitude to the counsel who appeared and who ably argued all aspects of the matter *pro amico*.

[23] I make the following order.

- (1) All the decisions of the Appeal Tribunal of the General Council of the Bar of South Africa made on 18th December 2014 in respect of the Third Respondent's appeal from the decision of the Bar Council of the Society of Advocates of KwaZulu-Natal are set aside.

C G LAMONT
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

ATTORNEY FOR APPLICANT: **Pieter Moolman Attorneys**

COUNSEL FOR APPLICAN: **Adv. A.J. Dickson SC**

ATTORNEY FOR RESPONDENT: Tomlinson Mnguni James

COUNSEL FOR THIRD RESPONDENT: Adv. P. Hodes SC

DATE OF HEARING : 16 May 2016

DATE OF JUDGMENT : 2 June2016