

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: 048948/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) NOT REVISED.

DATE: 9/6/2023

SIGNATURE:

In the matter between:

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL

APPLICANT

and

WYNAND NAUDE

FIRST RESPONDENT

NAUDE WYNAND INCORPORATED ATTORNEYS SECOND RESPONDENT

LEAVE TO APPEAL - JUDGEMENT

FRANCIS-SUBBIAH, J:

[1] The respondents bring an application for leave to appeal the decision of the urgent court granting an interim order for suspension of the first respondent from practising as an attorney, pending the final outcome of Part B of the application.

[2] Reasons for Court Order dated 30 March 2023 sets out several of the issues raised in this leave to appeal application. Furthermore, I elaborate on a few salient points raised.

[3] The respondents submit that the court's *prima facie* view that that the first respondent is not a fit and proper person to continue to practice as an attorney and

therefore surrender his certificate of enrolment as a legal practitioner, has the effect of a final order.

[4] The order granted by the court on 22 February 2023 is not a final order. It is an interim order and the matter has not reached finality. In the interim the first respondent is suspended from practicing as an attorney pending the finalization of the matter in Part B. Surrender of his certificate of enrolment has not finalized the matter. The first respondent was not struck off the practicing roll but suspended for a period of time pending the finalization of Part B. This entails a full investigation and consideration of all the facts on a balance of probabilities as stated in ***Prokureursorde Van Transvaal v Kleynhans*** 1995 (1) SA 839 (T) at 839. On a final determination by the Court, the suspension can be uplifted or the first respondent can be struck from the roll.

[5] No decision was made without consideration of the respondents' submissions.

The *audi alteram partem* rule was adhered. The respondents were given a hearing in the urgent court, where they filed their answering affidavit, supplementary affidavits, annexures and letters. For approximately more than two hours, the respondents' Counsel led argument engaging the court with their version. Having considered his submissions, the first applicant was found not be fit and proper to practice as an attorney in the interim, pending a full investigation. This is a preliminary determination as set out in paragraph 5 of the court's reasons for granting the interim order.

[6] A suspension from practice is not a penalty, it is in the interests of the Public. It is common cause that the first respondent has no fidelity fund certificate. Practicing for one's own account without a fidelity fund certificate is a criminal offence subject to a fine and imprisonment. Therefore, if the first respondent disputes that he is not practicing, then there is no prejudice to be suffered.

[7] Submissions by the respondents that in the judgment no mention is made of factual disputes. This is incorrect as the reasons at paragraph 12,23 and 28 refers to

factual disputes and that any factual disputes can be comprehensively addressed in terms of Part B of the application.

[8] The respondents contend that the court ignored the counter application by not making a single reference to it in the reasons. Once again this is incorrect. The court deals with this issue at paragraph 6 with reference to many court decisions in explaining that a court holds the discretion alone to determine whether an attorney is no longer a fit and proper person to practice. It is trite that there is no requirement that internal disciplinary actions by the overseeing professional body be conducted or completed in making the determination. For these reasons *'the first respondent seeking to set aside the referral of his conduct to the LPG by the investigating committee does not arise before the court.'*

[9] The Supreme Court of Appeal enunciated the correct approach to a leave to appeal consideration in **S v Smith** [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) at paragraph 7 where the Court held as follows:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[10] A court of appeal will not be able to decide this case until Part B of the proceedings are concluded. The respondent's request to refer the matter for evidence was not ignored, the matter is not finalised and part Bis envisaged to deal with factual disputes. This is one of the reasons why the court has granted an interim and not a final order. The interim order is not *res judicata* and in the interests of justice the order is not appealable.

[11] In ***Vassen v Law Society of the Cape of Good Hope*** 1998 (4) SA 532 (SCA) at 537-538, the court held that:

"In an appeal against the exercise by the Court *a quo* of its discretion, this court has a limited power to interfere. It can only do so on certain well recognized grounds, viz where the Court *a quo* exercised its discretion capriciously, or upon a wrong principle, or where it has not brought its unbiased judgment to bear on the question or where it has not acted for substantial reasons."

The applicant submits that this court has not contravened any of these well recognised grounds in exercising its discretion and therefore the leave to appeal should be dismissed.

[12] It has come to be the accepted general rule that South African Legal Practice Council is entitled to costs on an attorney and client scale as held in ***Law Society of the Northern Provinces v Mogami & Others*** 2010 (1) SA 186 (SCA) at paragraph 31. This rule enables the South African Legal Practice Council to be fully reimbursed for bringing to the court's attention any misconduct by a legal practitioner. It follows therefore that the costs of this application are to be paid by the respondents.

[13] For these reasons I find that a court of appeal cannot not reasonably arrive at a different conclusion. Further the matter has not reached finality and is not appealable. There are no dispassionate and rational basis for prospects of success on appeal.

[14] Accordingly, I make the following order:

Leave to appeal is refused with costs on an attorney and client scale.

R. FRANCIS-SUBBIAH
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of Hearing: 8 June 2023

Date of Judgment: 9 June 2023

Appearances:

COUNSEL FOR APPLICANT: MR L GROOME

ATTORNEYS FOR APPLICANT: Rooth & Wessels Inc.

COUNSEL FOR RESPONDENT: ADV. GEYER ATTORNEYS FOR

RESPONDENTS: Smit & Marais