



IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 621/2023

In the matter between:

THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL

Applicant

and

JOHANN OOSTHUIZEN

Respondent

CORAM: MOLITSOANE J , *et* VAN RHYN, J

JUDGMENT BY: VAN RHYN, J

HEARD ON: 25 MAY 2023

DELIVERED ON: 22 JUNE 2023

- [1] The issue for determination in this application is whether the applicant, the South African Legal Practice Council (the "LPC") is entitled to the relief claimed taking into account the sanction imposed by the Disciplinary Committee of its Provincial Council on 15 December 2021. The LPC is a body established in terms of section 4 of the Legal Practice Act¹ ("LPA"), with full legal capacity,

¹ Act 28 of 2014

and which exercises jurisdiction over all legal practitioners as contemplated in the LPA.

[2] The respondent, Mr Johann Oosthuizen, is a legal practitioner from Bloemfontein. He is currently not practising as an attorney. At a disciplinary enquiry conducted on 15 December 2021 the respondent, by agreement between the *pro forma* prosecutor, Mr Ryan Ishmael (the "prosecutor") and himself, pleaded guilty to the charges levelled against him. They agreed to ask for the penalty and sanction which was ultimately imposed by the Provisional Disciplinary Committee of the LPC.

[3] Subsequent to the disciplinary hearing on 15 December 2021, the Disciplinary Committee delivered its judgment on the 20th of December 2021. The Disciplinary Committee held that the prosecutor accepted the explanation of the respondent and proposed a sanction. The panel was of the view that the respondent was found guilty on very serious offences of the LPA and confirmed the sanction proposed to the Committee. The following order was made:

"ORDER:

15. The following sanction is confirmed.

Being found guilty on the abovementioned charges, the Respondent:

15.1 be suspended from practice or being on the practising or non-practising roll for five years;

15.2 will pay the fine in the amount of R15 000.00(fifteen thousand Rand) to the Legal Practise Council within 7 (seven) days of this hearing;

15.3 shall facilitate the payment of R100 000.00 (one hundred thousand Rand) which is held in trust at Honey Incorporated Attorneys to the complainant, Mr M Aroonslam.

15.4 Prior to the lifting of the suspension the Respondent shall undergo a Practice Management Training Course."

[4] It is common cause that the respondent, in compliance with the order of the Disciplinary Committee, paid the amount of R100 000.00 on 12 January 2022 as restitution towards Mr Aroonslam. On 28 February 2022 the respondent paid the fine, in the amount of R15 000.00, imposed by the Disciplinary Committee.

[5] In this application the LPC seeks an order in the following terms:

- 5.1 striking the respondent from the roll of legal practitioners of the High Court of South Africa; and
- 5.2 confirming its Disciplinary Committee's sanction imposed on the respondent in as far as it relates to payment of a fine and repayment of misappropriated funds by the respondent in terms of the provisions of section 40(3)(a)(i) and (ii);
- 5.3 the respondent to surrender and deliver to the LPC his certificate of enrolment as an attorney;
- 5.4 costs of the application on the scale as between attorney and client.

[6] The application is opposed by the respondent. The facts underlying this application are as follows: The respondent was admitted and enrolled as an attorney of this court on 5 March 2009. He commenced practicing as a professional assistant at Van Deventer & Thoabala Inc. ("Van Deventer Thoabala") with effect from 1 February 2010 until 10 June 2010. He became a director at the said firm of attorneys from 11 June 2010 until his resignation on 26 August 2020.

[7] The LPC moves for an order removing the respondent from the roll of legal practitioners on the basis that an uncontested case has been made at the LPC disciplinary committee level, founding a case for his removal. The grounds for seeking the removal of the respondent's name from the roll arise from a complaint by a certain Mr Morchim Aroonslam pertaining to the misappropriation of unallocated trust funds in the form of a credit fund entrusted to Van Deventer Thoabala by SA Home Loans in favour of the said Mr Aroonslam. On the 16th of July 2007 S A Homeloans paid the amount of R51 506.68 and a further amount of R22 250.00 into the Trust Account of Van Deventer Thoabala from the proceeds of a transfer of Mr Aroonslam's property. Furthermore, the respondent failed to ensure that the unallocated trust funds were paid over to the LPC Fidelity Fund in terms of the provisions of section 87(4)(a) of the LPA.

- [8] Mr Grobler SC, counsel on behalf of the respondent, submitted that it is evident that the LPC seeks confirmation of its own sanction imposed more than a year ago. The LPC further seeks, but on a usable reason in law, left wholly unexplained, the right to revisit its decision and seeking further punitive and, according to the applicant, preventative relief.
- [9] It is the respondent's contention that he concluded an agreement with the prosecutor on the day of his disciplinary enquiry. The agreement was that he would plead guilty to the charges that were levelled against him, which included a charge of misappropriation, for the purposes of concluding an accord. But because the prosecutor truly appreciated what had happened, they agreed on a sanction that the full facts of the matter must be put before the disciplinary committee and that the sanction the prosecutor would ask for, would be the one the disciplinary committee ultimately imposed.
- [10] The LPC provides no basis for reconsideration of the sanction, except that the National Office apparently decided the sanction to be too lenient. The applicant has not made a case that based on new facts, irrationality of the sanction imposed or anything of the like, there should be a reconsideration of the sanction ordered by the Disciplinary Committee.
- [11] Section 23 of the LPA empowers the establishment of Provincial Councils and that the LPC may delegate to the Provincial Council such powers and functions, which, in the interest of the legal profession are better performed at provincial level. Mr Grobler SC concedes that the provisions of section 23 has to be read with section 21 in that the delegation or assignment does not divest the Council of the responsibility for the exercise of the power or performance of the duty of the function.² However, there is an important proviso. The act states that no such variation or revocation of a decision "... may detract from any rights that may have accrued as a result of the decision"³.

² Section 21(2)(b).

³ Section 21(3).

- [12] According to the principle described by Baxter⁴ as the deconcentration of administrative power, the delegator is still regarded as the actor and remains liable for the exercise of the power.⁵ Thus, the LPC remains responsible for the actions performed by the Provincial Committee *vis à vis* the respondent. However, it is now the exact same entity that arrogates the right to revisit the issues which have already been decided.
- [13] This means that the applicant does not have the authority to vary or revoke any decision it has already made, because the respondent has vested rights that will be detrimentally affected if the applicant is allowed to do so. There can be no doubt that the hearing conducted by the Disciplinary Committee and the imposition of the sanction upon the respondent constitutes administrative action as defined in the Promotion of Administrative Justice Act.⁶ The decision taken to impose the sanction that it did on 20 December 2021 stands and binds, unless reviewed.⁷ The action taken by the Disciplinary Committee has legal consequences that cannot simply be overlooked.⁸
- [14] Mr Mazibuko, council on behalf of the applicant, argued that the sanction imposed upon the respondent was not final nor binding upon the parties. The Disciplinary Committee's sanction must be seen as a "recommendation" and not a final sanction. The court remains the ultimate arbiter. In terms of the provisions of section 40 (3) of the LPA, the Disciplinary Committee may in the case of a legal practitioner, *inter alia*, order him or her to pay compensation, impose upon him or her a fine payable to the Council and temporarily suspend him or her from practising or from engaging in any particular aspect of the practice of law. In terms of the provisions of section (3) (iv) the Disciplinary Committee may advise the Council to apply to the High Court for an order striking his or her name from the roll of legal practitioners or for an order suspending him or her from practice.

⁴ Baxter, *Administrative Law*, Butterworths, 1984 p 437

⁵ Naidoo v Johannesburg City Council 1979 (4) SA 893 (W) at 897.

⁶ Act 3 of 2000.

⁷ Oudekraal Estates (Pty) Limited v City of Cape Town 2004 (6) SA 222 (SCA).

⁸ Oudekraal Estates (*supra*) at [26].

- [15] Mr Mazibuko relied upon the provisions of section 44 of the LPA and the judgment delivered in the matter of **Eastern Cape Provincial Council of South African Legal Practice Council v Mfundisi**⁹ for the relief claimed. Section 44 of the LPA provides as follows:

"44. Powers of High Court. — (1) The provisions of this Act do not derogate in any way from the power of the High Court to adjudicate upon and make orders in respect of matters concerning the conduct of a legal practitioner, candidate legal practitioner or a juristic entity.

(2) Nothing contained in this Act precludes a complainant or a legal practitioner, candidate legal practitioner or juristic entity from applying to the High Court for appropriate relief in connection with any complaint or charge of misconduct against a legal practitioner, candidate legal practitioner or juristic entity or in connection with any decision of a disciplinary body, the Ombud or the Council in connection with such complaint or charge."

- [16] I agree with the contention on behalf of the respondent that the application by the applicant was not made in pursuance of section 40 of the LPA. In other words, the application was not made on the basis that the "recommendations" made by the Disciplinary Committee may only be imposed by the court in terms of section 40 of the LPA. Furthermore, the application is not based upon any allegation that the sanction imposed by the Disciplinary Committee was too lenient and that such sanction is to be set aside and for the court to impose an alternative and more stringent sanction, namely to strike the respondents name from the roll of legal practitioners.

- [17] Mr Grobler SC argued that reliance upon the **Mfundesi** matter does not assist the applicant. In **Mfundesi** a recommendation was made and the court found that the recommendation is non-binding. In the matter at hand the respondent pleaded guilty as per the compromise between the respondent and the prosecutor and a sanction was imposed by the Disciplinary Committee.

Mr Grobler SC explained the situation to be similar with a defence of *atrefois convict* in a criminal matter. I agree.

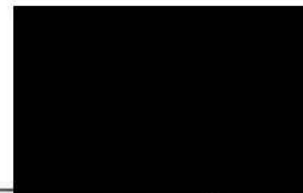
⁹ [22] ZAECMKHC 87.

- [18] The LPC did not seek an order to overturn the decision taken and the sanction implemented by the Disciplinary Council. I am of the view that the LPC is not entitled to essentially revoke and vary its own prior decision and to seek the relief claimed. The application must thus fail. There is no reason why the costs should not follow the event.

ORDER:

I propose the following order:

1. The application is dismissed with costs.



VAN RHYN. J

I concur.



MOLITSOANE. J

It is so ordered.

On behalf of the Applicant:

Instructed by:

ADV. M S MAZIBUKO

AMADE & COMPANY INC.

On behalf of the Respondent:

Instructed by:

ADV. S GROBLER SC

PEYPER ATTORNEYS

