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

Case No: A523/17

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

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SIGNATURE

07 November 2019
DATE

In the appeal between:

WILLIE JANSEN	**APPELLANT**
and	
LAW SOCIETY OF THE NORTHERN PROVINCES	**RESPONDENT**
In re the disciplinary proceedings between:	
LAW SOCIETY OF THE NORTHERN PROVINCES	**COMPLAINANT**
and	
WILLIE JANSEN	**RESPONDENT**

JUDGMENT

LESO JA

INTRODUCTION

[1] The Appellant brought an application for an appeal against the finding and sanction imposed by the Disciplinary Committee of the Law Society of the Northern Provinces on 12 September 2017 in terms of section 73 of the Attorneys Act[1] ("the Act").

[2] The Appellant was charged with unprofessional, dishonourable, and unworthy conduct in that he contravened Rule 40.10 of the Rules of the Attorneys Profession by failing or neglecting to give proper attention to the matter of a client (Mr Makhubela). He was found guilty for failing to issue a summons on timeously and he was consequently given a sanction in the form of a warning.

[3] In these proceedings, the Appellant seeks an order setting aside the finding and sanction. He further seeks an order that the Respondent pay costs including the costs occasioned by the previous postponement.

[4] This application was initially set down to be heard on 11 September 2019 but was postponed due to incomplete records having been filed. Like the Appellant, the Respondent also seeks the wasted costs occasioned by the postponement.

ISSUES ON APPEAL

[5] The Appellant's counsel handed up supplementary heads of argument wherein he addressed the court on the issue of costs. I will deal with this issue later in my judgment.

[6] The main ground of the appeal is the point raised by the Appellant that he was charged and found guilty of an offence that was not the subject of the initial complaint filed by the complainant. According to the Appellant, the complaint that was filed focused on whether he had lied to Mr Makhubela (the

[1] 53 of 1979.

complainant) when he informed him that he had issued the summons whilst he had not.

[7] During argument, the Appellant's representative also submitted that the finding of the Disciplinary Committee has an adverse effect on the Appellant's career as he was now acting as a Magistrate.

[8] It is common cause that the issue of the charge preferred against the Appellant was raised by the Appellant's representative at the commencement of the proceedings before the Disciplinary Committee. The charge sheet was thereafter amended to read: "*contravention of Rule 40.10 of the Rules of the Attorneys' Profession*" ("the Rules"), promulgated in terms of section 74(2) of the Act. Both parties agreed to proceed on the amended charge sheet and the Appellant's representative did not raise any further concerns regarding the formulation of the charge sheet.

[9] In respect of the issue of the incorrect and/or irrelevant charge, the Respondent's representative submitted that it was the prerogative of the Law Society to decide, after receiving and investigating a complaint, on which charge(s) to proceed. The Appellant's representative disagreed and submitted that the complainant's complaint to the Law Society was that the Appellant would have lied by informing him (the complainant) and/or his attorney that he had issued summons whilst that had not been done. In this regard the court was referred to the complainant's statement where he stated that: "*Mr Jansen told my lawyer that he never served Mandla, that is why I want Law Society to help me.*"

EVALUATION OF EVIDENCE

[10] Despite the manner in which the charge was formulated, I am satisfied that the Appellant understood what he was charged with. I am also satisfied that he had a fair opportunity to respond to the charge preferred against him.

[11] The Appellant gave a detailed account of his activities and also referred to several consultations that he had had with the complainant:

i. On 21 April 2015 the Appellant consulted with the complainant and on the same day the Appellant drafted a letter of demand to be served on the Debtor.

ii. On 12 May 2015 the Appellant served the letter of demand on the Debtor.

iii. On 8 June 2015 the Appellant received proof of service of the letter of demand and thereafter prepared a handwritten draft summons to be typed.

iv. On 10 July 2015 the Appellant received the summons back from the typist. The complainant received a call from the receptionist to consult with the Appellant on 21 July 2015. The complainant failed to attend the consultation.

v. On 5 August 2015, when the summons came back from the typist, the Appellant consulted with the complainant. He also gave the complainant a copy of the draft summons.

vi. On 25 August 2015 the Appellant amended the summons and handed same to the typist.

vii. During September 2015 the Appellant received the summons back from the typist.

viii. In October 2015, the Appellant referred the matter to his supervisor seeking advice on the matter.

ix. In November 2015 the Appellant got sick and in December 2015 the offices were closed.

x. In January 2016 the complainant terminated the Appellant's mandate and appointed a private attorney.

[12] I now turn to the important issue and that is to consider whether the offending conduct relied upon by the Respondent has been established. The charge preferred against the Appellant is that he contravened Rule 40.10 of the Rules which provides that an attorney must use his best efforts to carry out work in a competent and timely manner and that he may not take on work which he reasonably believes he cannot attend to. The elements of this offence are as follows:

i. competence; and

ii. timeous execution of duties.

[13] The Respondent's representative classified the Appellant's reasons for the delay into three categories, namely, client related, administration and expertise. Although the expertise of the Appellant was not an issue, the Disciplinary Committee nonetheless made the following finding in respect of the competence of the Appellant: "*there was no need to discuss the letter of demand or the summons with the client. The client could not have given any help or advice on that. We do not accept the explanation that you have to consult with him again. If you took proper instructions, it would not be necessary. Just to say I work like that is not enough for us.*"

[14] Before the Disciplinary Enquiry, the complainant testified that he had attended numerous consultations with the Appellant. I have already alluded to his evidence in this regard. He also confirmed that he was advised by the Appellant to open a criminal case against the Debtor implicated in his matter.

[15] The Appellant admitted that on 12 May 2015 he was in possession of all the necessary documents to issue summons. However, in May, he realised that he needed further information from the complainant before issuing summons. He then arranged a further consultation. The Disciplinary Committee was not impressed and made the following comments in its findings: "*the Committee is not satisfied with your explanation of why you did not proceed to issue the*

summons according to the instructions. As early as May 2015 you had enough detail to proceed with the summons. You are relative senior lawyer and no further consultations were necessary according to the Committee."

[16] The Disciplinary Committee concluded that the Appellant had delayed service of the summons for the seven months whilst, in its view, the summons was ready as of the 5th of August 2015.

[17] The complainant's version was that, in July 2015, the Appellant informed him that the summons had been served and that he would call him to give him (the complainant) the court date. This evidence was disputed by the Appellant. There is evidence that the complainant did not attend the consultation which was scheduled for 21 July 2015 and that when the complainant did turn up for a consultation in August 2015, the Appellant gave him a copy of the summons.

CONCLUSION

[18] Although there was a delay in issuing the summons, I am of the view that the delay was not unreasonable.

[19] Moreover, although it is accepted that the Legal Aid Board has the duty to diligently and timeously attend to matters brought to it by indigent clients, I am not persuaded that the Appellant in this matter did not diligently attend to the complainant's matter.

[20] I am also not in agreement with the criticism levelled against the Appellant's decision to seek an opinion from his senior. The Appellant has explained why he needed to discuss the matter with his senior and there is no reason to reject his explanation.

[21] For the reasons set out hereinabove, I am not persuaded that the Appellant is guilty of the offending conduct. It therefore follows that his guilty finding and sanction should be set aside.

COSTS

[22] The Respondent blamed the Appellant for the postponement on 11 September 2019 which was occasioned by the fact that the court record was incomplete. It was in turn submitted on behalf of the Respondent that it was the Appellant who had made an undertaking to see to it that the court file be attended to in order to enable the matter to proceed on the next hearing.

[23] I am, however, not persuaded that the postponement was due to the fault of the Appellant. The obligation to file the record rested with the Respondent and not the Appellant. Moreover, it would have been impossible for the Appellant to supplement the court record as he was not in possession of the complainant's file given that he was no longer in the employ of the Legal Aid Board. Moreover, in terms of section 73(1), (3)(a) and (b) of the Act, the Respondent had a duty to file copies of the record, including the documentary evidence, with the court. This section reads as follows:

> *(1) A person who has been found guilty in terms of section 72 may within a period of thirty days of the date of the council's decision appeal to a competent court against that finding by lodging with the registrar of that court a notice of appeal setting out in full his grounds of appeal.*
>
> *(3) The secretary of the society concerned shall within a period of thirty days of the date upon which he received the notice of appeal referred to in subsection(1), send to the registrar referred to in that subsection in respect of the enquiry concerned –*
>
> *(a) three copies of the record referred to.in section71 (3);*
>
> *(b) documentary evidence admitted at the enquiry.*

[24] In light of the aforegoing, I am thus not persuaded that the Respondent is entitled to the costs occasioned by the previous postponement.

[25] On the issue of costs of the appeal, I am of the view that costs should follow the result.

[26] In the result, I propose the following order:

1. The appeal is upheld.
2. The finding and sanction of the Disciplinary Enquiry are set aside.
3. The Respondent is to pay the wasted cost occasioned by the postponement of 11 September 2019.
4. The Respondent is to pay the costs of the appeal on a party and party scale.

J T LESO
ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

I AGREE AND IT IS SO ORDERED.

A C BASSON
JUDGE OF THE GAUTENG DIVISION, PRETORIA

DATE OF THE HEARING : 10 October 2019

APPEARANCES

For Appellant : Adv Janse Van Rensburg
Instructed by : Baartman & Du Plessis Attorneys

For Respondent : L Groome
Instructed by : Rooth & Wessels Attorneys