Case No 78/98

IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

In the matter between

FAROUK JASAT **APPELLANT**

and

NATAL LAW SOCIETY **RESPONDENT**

CORAM **: F H GROSSKOPF, NIENABER, MARAIS, SCOTT *et* ZULMAN JJA**
HEARD **: 20 MARCH 2000**

DELIVERED **: 28 MARCH 2000**

Attorney committing perjury in criminal proceedings and suborning another to do likewise - struck off roll.

J U D G M E N T

SCOTT JA:

[1] The appellant practises as an attorney in Pietermaritzburg. He appeals to this Court against an order of the Natal Provincial Division striking his name off the roll of attorneys.

[2] In July 1993 the appellant was charged with housebreaking with intent to steal and theft. On 12 December 1994 he was convicted in the Regional Court of housebreaking with intent to trespass and was sentenced to a fine of R 3000. He appealed to the Natal Provincial Division. The appeal was dismissed on 5 December 1995. On appeal to this Court the conviction was altered to "housebreaking with the intent of contravening s 1(1)(a) of the Trespass Act, 1959, and the contravention thereof"; the appeal was otherwise dismissed. The judgment, which was delivered on 7 March 1997, has been reported - see *S v Jasat* 1997 (1) SACR 489 (SCA).

[3] Shortly thereafter the respondent launched the proceedings resulting in the order against which the appellant now appeals. In its founding papers the respondent relied not only on the appellant's conviction but also on his conduct at the criminal trial, *viz* the raising of what was described by the respondent's chief executive officer as "a specious alibi defence".

[4] It is necessary to set out the facts of the criminal case. I shall do so in brief as they appear more fully from the reported judgment of Nienaber JA in *S v Jasat*, *supra*. On Friday 2 April 1993 an attorney, Mr Baboo Akoo who practised from a suite of offices in Loop Street, Pietermaritzburg, fled the country for London. On Sunday 4 April 1993 he telephoned his clerk, Mr Chutterpaul, to say that he would not be returning to South Africa. He suggested that Chutterpaul help himself to certain items in the office, including the law reports. The latter commendably declined to do so and reported the matter to the Natal Law Society instead. The following day, Monday 5 April 1993, Mr Rees, an executive officer of

the respondent, took control of the premises. He had the lock to the front door changed; he also had a duplicate key made for a filing cabinet which, according to Chutterpaul, contained files relating to the appellant. On the same day the appellant telephoned Rees; he told him that certain files in the office belonged to him and that he was anxious to recover them. Rees's attitude was that no files would be released to the appellant until the Law Society had been appointed curator bonis and the appellant had signed the usual form indemnifying the Law Society. The following day, Tuesday 6 April 1993, was a public holiday. Mr Pienaar, a consulting engineer who worked in the office next door to that of Akoo, encountered two men at the entrance. The one was carrying a box of files, the other, whom Pienaar later identified as the appellant, was busy wiping the aluminium frame of the door to Akoo's offices. When confronted, the man with the files said that they were from "Special Security Services" and that they had been sent to collect files. After they had gone Pienaar examined the lock. It had been forced. He

thereupon telephoned the police. In the meantime, Mr Dlamini, a security guard on duty in the building, had recorded the registration numbers of all motor vehicles parked in the parking area. One of them was a vehicle which proved to be registered in the name of a company of which the appellant was the sole director. Dlamini also observed this vehicle being driven by a person whom he described as an "Indian male". On learning that a break-in had occurred, Rees arrived at the premises at about 11 am. The first thing he noticed was that the filing cabinet for which he had had a key made was missing. The appellant denied that he had broken into Akoo's office or arranged for someone else to do so. He testified that at the relevant time he and Akoo's cousin, Mr Yusuf Akoo, were busy hiring a truck for the purpose of assisting Akoo's wife to move house. Mr Yusuf Akoo gave evidence in support of the appellant's alibi.

[5] The Regional Court rejected the appellant's alibi. Because, however, the State had failed to establish that the filing cabinet and the missing files belonged

to someone other than the appellant, he was convicted of housebreaking with intent to trespass and trespass as opposed to housebreaking with intent to steal and theft. As previously indicated the conviction was confirmed on appeal to the High Court but altered in a minor respect on appeal to this Court.

[6] In his answering affidavit filed in the striking-off proceedings the appellant admitted for the first time that he had lied under oath at the criminal trial. He said that he had indeed entered Akoo's premises and removed the steel filing cabinet as well as other files and that he had been correctly identified by Mr Pienaar. He contended, however, that by reason of his alibi defence all the facts relating to his conduct had not emerged during the criminal proceedings and that he was not guilty of the offence of which he had been convicted as he honestly believed that he was entitled to enter Akoo's premises when he did. In addition, he sought to explain how it had came about that he had lied in court and contended that his conduct and conviction notwithstanding, he remained a fit and proper person to

continue practising as an attorney.

[7] In short, the appellant's explanation, as amplified in evidence, was the following. He said that he and his brother practised in partnership for many years until the latter suffered a heart attack. For some years prior to the termination of their partnership, the relationship between the two of them had been acrimonious. In 1992, after his brother had removed confidential documents from his safe, the appellant arranged with Akoo for the latter to accommodate a steel filing cabinet in his office in which the appellant could keep certain confidential documents and files. The cabinet was also to be used for storing Akoo's own files which related to matters in which Akoo acted for the appellant. The appellant paid for the cabinet and both retained a key. On discovering that Akoo had fled, the appellant believed it essential to recover his files and documents before their confidentiality was compromised or before they fell into the hands of his brother. On Monday 5 April 1993 the appellant telephoned Rees to arrange for the urgent retrieval of his files.

Rees was uncooperative and advised the appellant that he would have to wait until a curator bonis had been appointed. The appellant said he then telephoned Akoo in London who had no objection to the appellant removing his papers. The appellant obtained the keys to the office from Mrs Akoo but found that the lock had been changed. He said he then telephoned a Mr Myburgh who had links with a security firm and arranged for the latter to meet him on Monday evening at Akoo's office. The appellant said he thought Myburgh would know of a locksmith who would be able to open the door. On arriving at Akoo's office he found Myburgh and two other persons whom he assumed to be locksmiths waiting for him. The door of the office was already open. The appellant explained that in his haste he had forgotten his key to the steel filing cabinet. To save him the trouble of going to fetch it, he simply removed the whole filing cabinet. He left Myburgh to close up the office. On arriving home he discovered there were a number of his files still in Akoo's office. He accordingly arranged to meet Myburgh at Akoo's office

the next morning. He said that on his arrival he found Myburgh waiting for him. The latter opened the door and the appellant retrieved the missing files. On leaving the office, the appellant said, he observed that the lock had been forced the previous day. While he was examining the lock they were confronted by Pienaar who wanted to know what they were doing. Myburgh falsely said that they were from a security company. The appellant explained that he was preoccupied with the lock and admittedly said nothing to contradict Myburgh's false explanation.

[8] Later, and upon reflection, he realised that the forced lock and false explanation would create the wrong impression. He testified that as far as he was concerned he had committed no crime. He had merely retrieved his own property with Akoo's permission. He contended that the Law Society had no right to change the locks and take control of the premises until it had been appointed curator bonis. In the event, the application for the appointment of a curator was only launched on 15 April 1993. The appellant decided, however, to do nothing and see what

happened. In July 1993 he was suddenly approached by the police and arrested. He was required to attend an identity parade where Pienaar pointed him out. He explained that he "became panicky" and, fearing he would be disbelieved if he told the truth, simply denied his presence at Akoo's offices on the day in question. He said that thereafter he "succumbed to the temptation" of perpetuating the lie.

[9] The Court *a quo* (Broome DJP and Mthiyane J) found it unnecessary to consider whether on the facts disclosed by the appellant he was guilty of the offence of which he was ultimately convicted. (It did, however, refer to certain features of the appellant's version which it considered improbable.) Instead, the Court *a quo* came to the conclusion that the appellant's conduct in advancing a specious alibi defence, knowingly giving false evidence in support of it and calling a witness to support his false evidence, had demonstrated that he was not a fit and proper person to continue to practise as an attorney and that he should be struck off the roll. In this Court counsel for the appellant contended that having regard to

all the circumstances of the case the Court *a quo* had erred in not only holding that the appellant was not a fit and proper person to continue to practise as an attorney but also in striking him off the roll rather than suspending him from practise for a limited period.

[10] The relevant provisions of s 22(1) of the Attorneys Act 53 of 1979 read as follows:

> "22(1) Any person who has been admitted and enrolled as an attorney may on application by the society concerned be struck off the roll or suspended from practice by the court within the jurisdiction of which he practises -
> .....
> (d) if he, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney."

In *Reyneke v Wetsgenootskap van die Kaap die Goeie Hoop* 1994 (1) SA 359 (A) at 369 D it was pointed out that the section requires a twofold inquiry. However, before one gets to the two inquiries referred to, there is a preliminary question that must be answered. Ultimately, therefore, what is contemplated is a three-staged

inquiry. First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities. (See for eg *Nyembezi v Law Society, Natal* 1981 (2) SA 752 (A) at 756 H - 758 A where the Court was concerned with the equivalent section in the now repealed Attorneys, Notaries and Conveyancers Admission Act 23 of 1934; see also *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA) at 654 D in relation to s 7 of the Admission of Advocates Act 74 of 1964.) The second inquiry is whether, as stated in s 22 (1) (d), the person concerned "*in the discretion of the Court*" is not a fit and proper person to continue to practise. The words italicised were inserted in 1984 (see *Law Society of the Cape of Good Hope v C* 1986 (1) SA 616 (A) at 637 B - C). It would seem clear, however, that in the context of the section, the exercise of the discretion referred to involves in reality a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, a value judgment. The discretion is that of the court of first instance. It is well established that a court of

appeal has a limited power to interfere and will only do so on well recognised grounds, *viz* where the court of first instance arrived at its conclusion capriciously, or upon 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 (*Law Society of the Cape of Good Hope v C*, *supra*, at 637 D - H; *Reyneke v Wetsgenootskap van die Kaap die Goeie Hoop, supra,* at 369 E - G; *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) at 537 D - G.) The third inquiry is whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order suspending him from practice for a specified period will suffice. This is similarly a matter for the discretion of the court of first instance and the power of a court of appeal to interfere is likewise limited. Whether a court will adopt the one course or the other will depend upon such factors as the nature of the conduct complained of, the extent to which it reflects upon the person's character or shows him to be unworthy to remain in the ranks of an

honourable profession (*Incorporated Law Society, Transvaal v Mandela* 1954 (3) SA 102 (T) at 108 D - E), the likelihood or otherwise of a repetition of such conduct and the need to protect the public. Ultimately it is a question of degree.

[11] The conduct of the appellant on which the Court *a quo* based its conclusion was not in dispute. However, it was submitted in this Court on behalf of the appellant that the Court below had misdirected itself in regard to both the second and third leg of the inquiry by over-emphasizing the importance of truthfulness and concluding that

> "[t]here can be absolutely no question but that an untruthful person is not a fit and proper person to practise as an attorney".

[12] This Court has in the past stressed that the profession of an attorney is an honourable one and as such demands "complete honesty, reliability and integrity from its members". (*Vassen v Law Society of the Cape of Good Hope, supra*, at 538 G). Similar statements have been made with regard to advocates. (See

for eg *Kekana v Society of Advocates of South Africa, supra,* at 655 G - H.) But this does not mean that any untruthfulness however trifling will render an attorney unfit to practise and liable to be struck off the roll. As important as the requirements of honesty, reliability and integrity are, each case must undoubtedly be examined in the light of its own facts and circumstances.

[13] Despite the somewhat categorical statement (quoted above) in the judgment of Broome DJP, who delivered the judgment of the Court *a quo*. I am far from satisfied that the learned judge intended his comments to be interpreted to mean that once it was found that the appellant had been untruthful that was the end of the matter. On the contrary, the judge went to some length to distinguish the appellant's conduct from what he referred to as "the sudden impetuous telling of a lie". This is apparent from the following passage in the judgment.

> "This just cannot be treated simply as the sudden impetuous telling of a lie. The fact of the matter is that he was party to the lie that his accomplice Myburgh told to Pienaar, and he was then, at the latest,

> aware of foul play in the sense that the door had been forced, and he himself told a lie (when first approached by police). That may well have been ill advised and something of which he did not foresee the consequences. But that was only the beginning. He persisted in telling lies thereafter. And this continued for a long time. He stood by these lies from July 1993 non stop until he delivered his answering affidavit on 31 July 1997. Not only that, but he set about embroidering his untrue version, attempting to bolster it with the false evidence of Yusuf Akoo, challenging the Applicant's right to do what it had done, and causing the reliability of the main State witnesses, Mr Dlamini and Mr Pienaar to be impeached. This was indeed a protracted attempt to deceive the courts. As he frankly conceded in evidence, had the decision in the Supreme Court of Appeal gone his way, he would have been content to have let it rest, that is to say let sleeping dogs lie and stood by his lies. He added that it would have been on his conscience."

The above statement I think fairly reflects the appellant's conduct. There is only one aspect which I would emphasize; that is that not only did the appellant himself commit perjury, but he suborned another to do so in order to lend credence to his own false evidence. Even assuming there was a misdirection on the part of the Court *a quo* in the respect alleged in par 11 above so that this Court would be free

to interfere, the conduct of the appellant, seen in its totality, is such that in my judgment there can be no doubt that it demonstrates him to be not a fit and proper person to continue to practise as an attorney. Furthermore, I can see no proper basis for an order merely suspending him from practice rather than an order striking him from the roll of attorneys. It follows that in my view the appeal must fail.

[14] A further issue between parties in this Court concerned the record of the evidence in the criminal proceedings. It was not included in the appeal record prepared by the appellant. The respondent objected to its omission and furnished six copies to the Registrar together with a petition to this Court to have the appeal record supplemented by the addition of what I shall simply call the "criminal record". The respondent opposed the relief sought. The real issue between the parties is who is to pay the costs of producing the criminal record.

[15] It is necessary to sketch briefly the background to the dispute. The founding papers filed on behalf of the respondent contained an undertaking that the

criminal record would be made available at the hearing. On this basis it was not annexed as part of the record. In its replying affidavit the respondent took up a different attitude. This appears from the following passage.

> "Respondent [appellant in this appeal] has brought into issue the correctness of his conviction for various reasons and it is now essential to introduce into the record of this matter the transcript of the Regional Court trial. This was referred to in my founding affidavit. A copy of this record will be filed evenly with this affidavit and will be referred to herein as "the Record".

A copy of the criminal record was accordingly filed by the respondent together with its replying affidavit. At a pre-trial conference the appellant was requested to admit the correctness of the criminal record. He, or rather his legal representatives, responded by indicating that the record would be covered by a paragraph of the minutes of the pre-trial conference (par 4.3) in which it was recorded that the parties would "consider the status of the documents when they are seen" and that the provisions of Rule 35 (9) would be applicable. In response to a question by the

Court a quo as to the status of the criminal record, counsel for the respondent indicated in his opening address that in pursuance of par 4.3 of the minute the criminal record was "admitted without challenge". There is nothing in the appeal record to suggest that the correctness of this statement was put in issue.

[16] On receipt of the appellant's answering affidavit the respondent found itself faced with a situation it could hardly have anticipated. It was not unreasonable for it to require that the criminal record be placed before the Court *a quo*. The record would have been relevant not only to test the appellant's new allegations regarding his admitted conduct against facts which emerged in the criminal trial, but also to establish the full extent of the appellant's dishonesty and the context in which he had lied both before and during the criminal proceedings.

[17] The criminal record was before the Court *a quo* when it was called upon to decide the application. In the absence of an agreement between the parties or some other good cause I can seen no reason why it should not have been before

this Court when deciding the appeal. Depending on the course of the argument it may well have been necessary to consult the criminal record. The respondent expressed concern in its petition that the absence of the criminal record might result in an adjournment or delay in the hearing of the appeal. Its concern was not unreasonable. It follows that in my view the petition must be allowed.

[18] In the result the following order is made.

(a) The appeal is dismissed with costs.

(b) The respondent's petition dated 24 June 1998 is upheld with costs, such costs to include the cost of the criminal record.

D G SCOTT
JUDGE OF APPEAL

F H GROSSKOPF JA)
NIENABER JA) - Concur
ZULMAN JA)

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: **78/98**

In the matter between

FAROUK JASAT **Appellant**

and

NATAL LAW SOCIETY **Respondent**

CORAM: GROSSKOPF, NIENABER, MARAIS, SCOTT *et* ZULMAN JJA

DATE HEARD: 20 March 2000

DATE DELIVERED: 28 March 2000

JUDGMENT

MARAIS JA

MARAIS JA:

For reasons which it is unnecessary to dwell upon I am not sure that there was no misdirection involved in the court *a quo's* exposition of what it considered to be the appropriate point of departure when dealing with an attorney who has been untruthful in a respect relevant to his calling. However I need come to no firm conclusion in that regard because, for the reasons given by my brother Scott, I am satisfied that, even if this court were at large in the matter, the result should be the same. I agree with the orders made.

R M MARAIS
JUDGE OF APPEAL