THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case No: 1096/16

In the matter between:

WARRICK LESLEY VISSER HEPPELL **APPELLANT**

and

THE LAW SOCIETY OF THE NORTHERN PROVINCES **RESPONDENT**

Neutral citation: *Heppell v The Law Society of the Northern Provinces* (1096/16) [2017] ZASCA 119 (22 September 2017)

Coram: Shongwe AP, Majiedt JA and Mokgohloa, Gorven and Ploos van Amstel AJJA

Heard: 31 August 2017

Delivered: 22 September 2017

Summary: Attorney – whether fit and proper to practise notwithstanding being sequestrated – whether suspension an appropriate sanction for an attorney guilty of non-disclosure of critical information when applying for his sequestration – no sound reason to interfere with the exercise of discretion.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (De Vos J and Mogotsi AJ sitting as court of first instance):

The appeal is dismissed with costs on the attorney and client scale.

JUDGMENT

Shongwe AP (Mokgohloa, Gorven and Ploos van Amstel AJJA concurring)

[1] The appellant, an attorney by profession, was suspended from practising as an attorney for a period of six months as from the date of the judgment of the Gauteng Division of the High Court, Pretoria (De Vos J and Mogotsi AJ). He now appeals against that judgment to this court with the leave of the court below.

[2] As a result of the appellant's successful application for the acceptance of the voluntary surrender of his estate, the respondent, the Law Society of the Northern Provinces (the Law Society) incorporated in terms of s 56 of the Attorneys Act 53 of 1979 (the Act), commenced an investigation into the appellant's fitness to remain in practice. The Investigative Committee of the Council of the Law Society of the Northern Provinces (the Council) concluded that the appellant was guilty of unprofessional or dishonourable or unworthy conduct and was no longer a fit and proper person to continue to practise as an attorney. The Law Society brought an application before the court a quo to have the appellant's name struck from the roll of attorneys, alternatively that he be

suspended from practising as an attorney on such terms and conditions as the court may deem appropriate.

[3] The appellant was admitted as an attorney on 7 May 1991 and thus became a member of the Law Society. He ceased to practise as an attorney on 30 May 2007 but remained on the roll of attorneys as a non-practising attorney. He ventured into business. He formed a close corporation, traded in liquor, and became a property developer and signed a number of suretyships for the debts of the close corporation. Due to the unstable economic climate the businesses were not doing too well. He eventually sold all that he had at a loss and decided to practise law again as an attorney from 1 September 2010. Because he could not cope with all his financial responsibilities while in business, he decided to approach the court with an application for the voluntary surrender of his estate which order was granted on 11 January 2012.

[4] After the appellant had been sequestrated, the Law Society instructed Ms Magda Geringer, a legal official in the employ of its Monitoring Unit, to investigate the circumstances which led to the appellant's sequestration. Ms Geringer visited the appellant's offices and presented a report to the Law Society on 6 July 2012. She reported, inter alia, that the appellant did inform the Law Society during August 2011 that he was contemplating applying for the voluntary surrender of his estate. She concluded her report positively in favour of the appellant. She mentioned that no complaints had been lodged against him regarding trust funds and that there appeared to be no risks for the Fidelity Fund, and finally that in her opinion the appellant was still a fit and proper person to practise as an attorney.

[5] After considering Ms Geringer's report, the disciplinary department of the Law Society resolved to refer the matter to the investigation committee of the Council to establish whether the appellant could be regarded as a fit and proper person to remain on the roll of attorneys, notwithstanding the sequestration of his estate. This was motivated by the provisions of s 22(1)(*e*) of the Act which provides as follows:

'22 Removal of attorneys from roll

(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 or she practises -

. . .

(*e*) if his or her estate has been finally sequestrated and he or she is unable to satisfy the court that despite his or her sequestration he or she is still a fit and proper person to continue to practise as an attorney.'

[6] After several consultations and a formal inquiry the committee concluded that the appellant had been dishonest in his application for voluntary surrender and failed to disclose material facts as he was obliged to do. It found amongst others that he misrepresented his liabilities under oath to the court as amounting to R146 000 whilst in actual fact, when the suretyships were included, they amounted to about R20 million. He had also failed to disclose that he was a practising attorney. He had misled the court concerning his monthly income and failed to disclose his monthly expenses relating to his practice. He had also failed to disclose the type of marriage he had entered into. The appellant's explanation for most of these discrepancies was that his attorney had drafted the founding affidavit and that he signed it without properly checking whether the content was correct or not.

[7] The committee resolved to refer the matter to the Council because it was not convinced that the appellant could be regarded as fit and proper to remain on the roll of attorneys. It expressed its disquiet on his failure to disclose all relevant facts and his failure to be honest with the court. The Council concluded that the appellant could not be regarded as a fit and proper person to practise as an attorney and resolved to refer the matter to court, hence the application to have his name struck from the roll of attorneys, alternatively to suspend him from practising as an attorney.

[8] The court a quo concluded that the appellant was not a fit and proper person to remain on the roll of practising attorneys 'without any form of sanction'. This conclusion was based on the proven facts that he failed to disclose that he was a practising attorney when he applied for his estate to be sequestrated, he failed to disclose properly the type of matrimonial regime he had entered into, he failed to disclose all the facts relating to his income and expenditure, he failed to disclose his suretyships accurately and he failed to make a proper disclosure of the current amount of his liabilities. It concluded that he was 'at least grossly negligent in his failure to make a full and proper disclosure to the court in his application for the surrender of his estate'.

[9] The appellant contended that he did not contravene any of the sections of the Act or rules of the Society; that there was no complaint lodged against him relating to his practice as an attorney; that he had no shortfall in his trust account; and that he did not contravene any of the provisions of the Insolvency Act 24 of 1936. He stated that he was not an insolvency practitioner and therefore not acquainted with applications for voluntary surrender and that he

relied on his attorney, Ms Esme King, as she was the expert in such applications. He denied that he was not a fit and proper person to practise as an attorney. He conceded, though, that he did not disclose the fact that he was a practising attorney but contended that he did not consider it relevant because the genesis of his voluntary surrender application arose from his business activities.

[10] The Law Society, on the other hand, argued that voluntary surrender applications required an even higher level of disclosure than the 'so called' friendly sequestration. This will place the courts in a better position to arrive at a correct finding and exercise their discretion properly 'especially in view of the fact that these applications are brought on an *ex parte* basis'. It further contended that some of the appellant's allegations under oath concerning his financial position were false. It submitted that he is therefore not a fit and proper person.

[11] The issue before this court is in essence, whether the court below was correct in finding that the appellant is not a fit and proper person to practise as an attorney and, if so, whether the sanction imposed should be interfered with on appeal. It is trite that this court must embark on a three-stage enquiry. (See *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA); [2000] 2 All SA 310 (A) para 10 and *Malan v The Law Society of the Northern Provinces* 2009 (1) SA 216 (SCA); [2009] 1 All SA 133 (SCA) para 4; *Wilkinson v The Law Society of the Northern Provinces* [2017] ZASCA 69 at para 4.) For completeness I shall restate the three-stage enquiry. First, the court must decide whether the alleged offending conduct has been established on a balance of probabilities. It is a factual inquiry. Second, consideration must be given to the question whether, in the discretion of the court, the person concerned is not a fit and proper person to

continue to practise. This involves a weighing up of the conduct complained of against the conduct expected of an attorney, and is a value judgment. And third, the court is required to consider whether, in light of all the circumstances, the name of the attorney concerned should be removed from the roll of attorneys or whether an order of suspension from practice would suffice. This is a matter for the discretion of the court.

[12] The Law Society in its founding papers laid out certain general principles as a prelude to what it alleged to be unprofessional misconduct. The appellant admits these principles as part of what an attorney must observe at all times. For example that 'the law exacts from an attorney *uberrima fides* – the highest possible degree of good faith – in his dealings with his clients, which implies that at all times his submissions and representations to his clients must be accurate, honest and frank'. I may add that, the submissions and representations should not only be honest and frank to his clients but, as an officer of the court, when moving his application for voluntary surrender he should have informed the court that he was an admitted attorney. He failed to disclose that he had signed suretyships with his creditors. Instead of admitting the fact that he did not disclose the suretyships he prevaricated and mounted a misconceived defence of why he failed to do so. He avers that he relied on the advice of his attorney Ms King, that the suretyships were contingent liabilities that had not been called up either by demand or summons. In my view, it is irrelevant whether the suretyships have been called up – their disclosure would certainly have affected the benefit to creditors. These suretyships amounted to about R20 million. Such failure to disclose is a contravention of the general principles.

[13] The appellant was obliged to be frank and honest with the court and disclose all relevant information. The failure to disclose these suretyships amounted to a misrepresentation of his liabilities. Had they been so disclosed, it is unlikely that the application for voluntary surrender would have succeeded. He also failed to fully disclose his income and expenditure. An example of this is that he indicated in his disciplinary hearing that he paid for his various insurance policies from his attorney's business account but did not disclose that he was an attorney or this fact. He did not give details of his income and expenditure from his practice, contenting himself with saying that his monthly income was R5 000. That he failed to disclose his marital status is not so weighty, as elsewhere in his papers he did mention that he was married out of community of property, though he did not provide other minor details. The appellant signed an affidavit wherein he confirmed the truthfulness of its contents, however during the enquiry by the Law Society he made a volte face by saying that he did not check or that he did not properly read the affidavit prepared by his attorney, but went on to sign it. An attorney's duty, amongst others, is to advise his clients not to sign documents without reading and understanding them. Here he does the opposite. His evidence is tantamount to perjury.

[14] The gravamen of this case essentially is whether he is a fit and proper person to remain on the roll of attorneys. In terms of s 22(1)*(e)* of the Act, the appellant bears the onus of satisfying the court that despite his sequestration he is still a fit and proper person to continue to practise as an attorney. Counsel for the appellant conceded during the hearing of this matter that, in this case it cannot be said that the court below exercised its discretion capriciously nor that it failed to bring an unbiased judgment to bear. Counsel attacked the exercise of the court's discretion on the basis that it exercised its discretion upon a wrong

principle or as a result of a material misdirection. It was unclear, from the submission made, what that wrong principle was.

[15] It is now settled that an appeal court has limited powers to interfere with the decision of the court below. See *Malan v The Law Society of the Northern Provinces* (supra) para 12. This court has on numerous occasions decided that this discretion is a strict discretion, meaning that a court of appeal will not interfere if the discretion was exercised judicially. (See also *Mabaso v Law Society, Northern Provinces & another* 2005 (2) SA 117 (CC) para 20 and *Giddey NO v JC Barnard and Partners* 2007 (5) SA 525 (CC) para 20.) In the present case the facts speak for themselves. I am unable to conclude that the court below exercised its discretion capriciously or that it based its judgment on a wrong principle. Therefore, the court found, correctly so, that the appellant is not a fit and proper person to practise as an attorney.

[16] I now turn to the question of whether the sanction of suspension is the appropriate one in the circumstances of this case. This, too, is a matter for the discretion of the court below. It has been consistently held by this court that the main consideration, when dealing with the aspect of sanction, is the protection of the public. I am of the view that not only is the protection of the public at stake, but also the errant attorney needs to be disciplined for his/her acts of misconduct. Of course, the court exercises its discretion depending on the degree and severity of the misconduct. In the present case the court below found that the appellant was ‘at least grossly negligent,’ however it acknowledged that there was merit in the Law Society’s contention that the appellant was dishonest. As I said earlier, this case deals with failing to fully and frankly disclose critical information to the court dealing with an application for

voluntary surrender. I am unable to fault the court a quo on the sanction of suspension. The court motivated the suspension on the basis that the appellant should be given the opportunity to rehabilitate himself. In order to do so, it held that he needs time to reconsider his unprofessional conduct while on suspension. Although the appellant did not admit his wrongful conduct, he justified his failure to disclose by blaming his attorney who prepared the papers on his behalf. His failure to admit and show remorse is a danger to the public, as he might continue to do it without realising it and accepting that it is unprofessional and unlawful. The period of suspension will indeed be an opportunity for him to reconsider and change his ways. It is hoped that, by taking this opportunity, he will return to practise as a better attorney, more attuned to his duty to the public and the court. His absence from practice will of necessity protect the public more than punishing him, in as much as he will think twice before committing the same act of misconduct.

[17] I therefore find that there is no basis to interfere with the exercise of the discretion of the court below.

[18] The appeal is dismissed with costs on the attorney and client scale.

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J B Z Shongwe
Acting President of the
Supreme Court of Appeal

Majiedt JA:

[19] I have read the well-reasoned judgment of my colleague, Shongwe AP. While I agree with the outcome and the underlying reasons, I deem it necessary to write separately on certain less than satisfactory aspects of the approach adopted by the high court.

[20] My colleague has narrated the facts comprehensively and they need no further elucidation, save to highlight and to add the detail which follows. It bears repetition and special emphasis that in her detailed report, Ms Geringer (referred to in para 4 above), made no negative findings whatsoever against the appellant as far as his practice as an attorney is concerned. On the contrary, she alluded to his unblemished professional record, in particular his handling of his trust account. As Shongwe AP states, Ms Geringer opined that there was no risk to the Attorney's Fidelity Fund or to the public should the appellant continue to practise. In addition, the curator of the appellant's insolvent estate, Mr A P Pretorius of Corporate Liquidators (Pty) Ltd, furnished the respondent with a letter indicating that he had no objection against the appellant continuing to practise as an attorney for his own account. Lastly, it was the appellant who had informed the respondent of his sequestration.

[21] The high court rightly concluded that the offending conduct did not warrant a striking off, but that some form of sanction was necessary. And it bears emphasis that, as Shongwe AP points out, the crux of the high court's finding was that the appellant had been 'at least grossly negligent in his failure to make a full and proper disclosure to the Court in his application for the surrender of his estate'. What must be borne in mind, therefore, is that on a conspectus of all the facts and circumstances the appellant's lapses related not

to his practice as an attorney, but to his failure to make full and proper disclosure in his ex parte application for voluntary surrender. Both his professional status as an attorney and the nature of his application required of him to have acted with the utmost good faith, which he lamentably failed to do. My concern relates to the approach adopted by the high court in deciding what sanction to impose, ie the third stage of the enquiry alluded to in para 10 above.

[22] My colleague has, with respect, correctly observed (in para 16 above) that the main consideration in respect of a suitable sanction is the protection of the public. That well established approach is strikingly lacking in the high court's reasoning. Evidently it was concerned mainly with the aspect of penalising the appellant. The high court held:

'Applying the principles emanated by the Rules of the Law Society, the applicable Act and the case law referred to above, I am of the opinion that the respondent is not a fit and proper person to remain on the Roll of practising attorneys without any form of sanction. An order sequestrating a debtor's estate affects such a person's status. The respondent had a duty to make a proper disclosure under the present circumstances. Having said that I am of the view that respondent can still be rehabilitated and should be granted an opportunity to rethink his actions before being allowed to practise as an attorney. I therefore propose that Mr Warrick Leslie Visser Heppell, the respondent in this matter, be suspended from practising as an attorney for a period of six months as from the date of this Order.'

[23] The impermissible narrow approach adopted by the high court is regrettable. In *General Council of the Bar of South Africa v Geach and others* 2013 (2) SA 52 (SCA), this court restated how such an enquiry is to be directed, by referring to the following dictum in *Van der Berg v General Council of the*

Bar of South Africa [2007] 2 All SA 499 (SCA) at para 50 (reiterated in *Malan* cited in para 10 above):

'The enquiry before a court that is called upon to exercise its disciplinary powers is not what constitutes an appropriate punishment for a past transgression but rather what is required for the protection of the public in the future'.

The same observation was also made by Nugent JA in *Law Society of the Cape of Good Hope v Peter* 2009 (2) SA 18 (SCA) para 28. And, in *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA) at para 7, this court said (albeit obiter):

'Logically, a striking-off order or an order of suspension from practice should be suspended only if the Court finds that the attorney concerned is a fit and proper person to continue to practise but still wishes to penalise him'.

[24] The high court not only failed to enunciate and follow the correct approach, but it also neglected to consider suspending the appellant's suspension from practice. Such an order of suspension could have been made for a period of, say, three years on appropriate conditions (for example, on condition that, during the period of suspension, the appellant not be found by a court or by the Law Society to have failed to make a material disclosure (either deliberately or negligently), whether on his own behalf or on behalf of a client of his.) A sanction of that type was competent and would, in my view, arguably have served to protect the public more than a suspension from practice for 6 months. But I am mindful of the very limited power of an appellate court to interfere with the discretion of a trial court in matters such as these. The cases cited in para 14 of my colleague's judgment makes this point very clear (see also: *Geach* at para 58 and *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA) at 654 E-H). A suspended suspension from practice on appropriate conditions for a lengthy period could not, in my view, be regarded

as too lenient. I think it would have been of adequate severity to have penalised the appellant for his reprehensible conduct and would simultaneously have served to protect the public. But the test is not what sanction I would have imposed – what requires determination is whether interference on appeal is warranted.

[25] To conclude and in summary: while the high court's underlying reasoning for the sanction imposed and the sanction itself are rather unsatisfactory, there are not sufficient grounds on which to interfere with the exercise of its discretion.

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S A Majiedt

Judge of Appeal

Appearances

For the Appellant:	N Davis SC with him M Coetzee
	Instructed by:
	Theron Jordaan & Smit Attorneys, Pretoria
	Symington & De Kok Attorneys
For the Respondent:	H J L Vorster
	Instructed by:
	Rooth & Wessels Incorpotated, Pretoria
	Peter Skein Attorneys, Bloemfontein