FINE v SOCIETY OF ADVOCATES OF SOUTH AFRICA (WITWATERSRAND DIVISION) 1983 (4) SA 488 (A)

Citation	1983 (4) SA 488 (A)
Court	Appellate Division
Judge	Rabie CJ, Cillié JA, Viljoen JA, Botha JA and James AJA
Heard	May 19, 1983
Judgment	May 27, 1983
Annotations	None

Flynote : Sleutelwoorde

Advocate - Misconduct - Disciplinary proceedings - Nature of enquiry - Section 7 (1) (d) of Act 74 of 1964 provides that Court first to decide whether advocate is a fit and proper person to continue in practice and secondly whether to suspend him or strike his name from the roll - First enquiry to be decided on a balance of probability - Court on appeal will investigate whether the finding was correct - Second enquiry to be decided in the exercise of the Court's discretion - Such decision will only be interfered with on appeal on the grounds of material misdirection or irregularity or because decision one no reasonable Court could make - Advocate signing lease on behalf of foreign lessee - Advocate fraudulently signing letter sent to lessor that he was holding sufficient funds on behalf of foreign lessee to cover rental for first six months of lease - Provincial Division's decision that advocate not a fit and proper person to continue in practice and that his name should be removed from the roll confirmed on appeal.

Headnote : Kopnota

Section 7 (1) (*d*) of the Admission of Advocates Act 74 of 1964 provides that, in disciplinary proceedings against an advocate, a Court must first decide whether or not the advocate whose conduct is under review is a fit and proper person to continue to practise as such; and secondly, if he is not, to decide whether to suspend him from practice or order his name to be struck from the roll. The first of these matters must be decided on a balance of probabilities, and the Appellate Division, on appeal, will investigate whether or not the finding of the Court *a quo* was correct and will set it aside if it is not. However, the second matter (ie whether the advocate should be suspended from practice or should have his name struck from the roll) is one for the Court *a quo* to decide in the exercise of its discretion, and the Appeal Court will only interfere with the exercise of this discretion on the grounds of material misdirection or irregularity, or because the decision is one no reasonable Court could make.

The appellant had been removed from the roll of advocates by a Provincial Division upon disciplinary proceedings instituted against him by the respondent Society. It appeared that the appellant had signed a lease in respect of certain property on behalf of a foreign lessee and, in terms of a clause in the lease requiring him to provide the lessor with a letter to the

effect that sufficient funds to cover the rental for the initial period of six months of the lease had been lodged with him, sent a letter in the aforementioned terms to the lessee. The letter

was to the appellant's knowledge false. In addition, by so acting the appellant was acting in contravention of a rule of the Professional Regulations of the respondent Society which prohibited a member of the Bar from practising as an advocate "while actively engaged in the carrying on of any other professional or commercial or industrial undertaking". The Court *a quo* had held that the appellant was not a fit and proper person to continue practising as an advocate and ordered his name to be removed from the roll. In an appeal,

Held, that the Court *a quo* was correct in concluding that the appellant was not a fit and proper person to continue practising as an advocate: the letter sent to the lessor of the premises was undoubtedly fraudulent; it was not an impulsive and ill-considered act and the inference was clear that the lessor was prepared to accept the appellant's assurance that he was holding the lessee's funds because he was a practising advocate. In addition it was clear that the appellant was in breach of the aforementioned rule of the respondent Society.

Held, further, that there were no grounds upon which the Court on appeal could interfere with the decision to strike the appellant's name off the roll of advocates. Appeal dismissed.

The decision of the Transvaal Provincial Division in *Society of Advocates of South Africa (Witwatersrand Division)* v *Fine confirmed.*

Case Information

Appeal from a decision in the Transvaal Provincial Division (NICHOLAS J and NESTADT J) The facts appear from the judgment of JAMES AJA.

F J Bashall for the appellant: Having regard to all the circumstances of the matter, the respondent failed to establish on a balance of probabilities that the appellant is not a fit and proper person to continue to practise as an advocate. Alternatively, even if the Court *a quo* was correct in holding that the appellant is not a fit and proper person to continue to practise as aforesaid, it misdirected itself as regards its discretion in ordering his name to be struck from the roll in terms of the provisions of s 7 (1) (*d*) of the Admission of Advocates Act 74 of 1964 and this Court will substitute its own discretion in the matter.

With reference to the decision of this Court in *Nyembezi v Law Society, Natal* 1981 (2) SA 752 on the corresponding provisions of the Attorneys, Notaries and Conveyancers Admission Act 23 of 1934 (now the Attorneys Act 53 of 1979), this Court should "have the final say as to the fitness or otherwise of" the appellant since, on admission to practise as an advocate, he also became an officer of this Court - *Nyembezi v Law Society, Natal* (*supra* at 757E - F). The respondent had the *onus* of persuading the Court *a quo* by evidence and argument that, on a balance of probability, the appellant is no longer a fit and proper person to continue to practise as an advocate. *Ibid* at 757E. As such finding is a finding of fact, this Court on appeal will investigate whether or not the finding is correct and set it aside if it is not. *Ibid* at 758B. In the second stage of the enquiry the Court of first instance decides in the exercise of its discretion whether to strike the advocate off the roll or whether to suspend him from practice. With this decision this Court on appeal will only interfere on the ground of a

material misdirection or irregularity. *Ibid* at 758C.

The facts in the present matter are similar to, but do not indicate as severe a degree of

blameworthiness as was the position in, *Rhodesian Bar Association v Maruza* 1976 (3) SA 334. Save for this single lapse, the appellant has proved himself to be a promising member of the legal profession and for his age has made an above average contribution to the profession to which he belongs. In all the above circumstances, the Court *a quo* erred in finding that the appellant is not a fit and proper person to *continue* to practise as an advocate and this Court will set such finding aside. Alternatively, the Court *a quo* did not exercise a discretion in the matter. Upon being persuaded that the appellant was not a fit and proper person to continue to practise as an advocate, it considered itself bound to order that the appellant's name be struck from the roll and did not consider the alternative of a suspension. See *Society of Advocates of SA (Witwatersrand Division)* v *Cigler* 1976 (4) SA at 358F. The failure of the Court *a quo* to appreciate its discretion as aforesaid constitutes a material misdirection or irregularity, especially in view of the finding by it that the appellant's "present position certainly excites compassion" and that, if "the object of these proceedings was to punish for misconduct, then the circumstances put forward by his counsel would weigh strongly in mitigation". In the premises, in the event of this Court upholding the finding of the Court *a quo* that the appellant is not a fit and proper person to continue to practise as an advocate, this Court will set aside the order of the Court *a quo* and itself decide whether the appellant should have been suspended from practice, with or without suspending the suspension, or whether in any event his name should have been struck from the roll of advocates. As regards this last possibility, the appellant's conduct, having regard to all the circumstances of the case, was not such as to compel the extreme measure of striking his name off the roll. Reference can also be made to the conduct for which the names of advocates have been struck from the roll in recent years in the following reported cases: *Society of Advocates of SA (Witwatersrand Division)* v *Fischer* 1966 (1) SA 133; *Beyers v Pretoria Balieraad* 1966 (2) SA 593; *Olivier v Die Kaapse Balieraad* 1972 (3) SA 485; *Society of Advocates of SA (Witwatersrand Division)* v *Cigler (supra)* and *Vereniging van Advokate van Suid-Afrika (Witwatersrand Afdeling)* v *Theunissen* 1979 (2) SA 218. As regards the possibility of suspending the appellant from practising, see *Rhodesian Bar Association v Maruza (supra).*

D S Levy SC (with him *L I Goldblatt*) for the respondent: The Court *a quo* correctly approached the application on the basis that it had to determine "whether the respondent is a fit and proper person to continue to practise as an advocate". See *Law Society v Du Toit* 1938 OPD 103; *Society of Advocates of SA (Witwatersrand Division)* v *Cigler* 1976 (4) SA at 358E - F. See *Ex parte Swain* 1973 (2) SA at 434H in regard to the appellant's conduct. See, also, *Hayes v The Bar Council* 1981 (3) SA at 1081E - 1082D. Having found that the appellant was not a fit and

proper person to continue to practise as an advocate, the Court *a quo* had no discretion but to remove him from the roll of advocates, failing which a person would have been on the aforesaid roll even though a Court of competent jurisdiction had held that he was not a fit and proper person to continue to practise as an advocate. The judgment of the Court *a quo*, does not justify the submission that that Court found that it had no discretion to order the appellant's suspension. The wording of s 7 of Act 74 of 1964 clearly empowers the Court to suspend or strike off where an advocate is found not to be a fit and proper person. The Court *a quo*, having found that the appellant was not a fit and proper person to continue in

practice as an advocate, examined the appellant's subsequent history to determine whether he was then fit and proper and found no justification for such a finding despite the testimonial to his previous and present course of conduct and his awareness of the error of his ways. Reference by the Court *a quo* to *Cigler's* case *supra* at 538E - F is a clear recognition by that Court of its discretionary powers to order a suspension in lieu of a striking off. The Court *a quo* considered the evidence in mitigation submitted by the appellant and held correctly "that insufficient time has elapsed since the conduct committed by Fine to enable one to feel confident that he has reformed and rehabilitated himself". This passage in the judgment clearly indicates that the Court *a quo* was aware of its discretionary power to order something other than a striking off; cf *Olivier v Die Kaapse Balieraad* 1972 (3) SA at 495H. In any event, this Court should equally find upon the facts that the appellant's name should have been struck from the roll of advocates. In the event of the appeal failing the respondent asks that the appellant be ordered to pay the respondent's costs excluding counsel's fees. In the event of the appeal succeeding, a similar order is nevertheless sought, it being the respondent's function and duty to the Court to bring matters of this nature before the Court and similarly to contest the appeal. Cf Ingelyfde Wetsgenootskap van die Transvaal v P 1963 (4) SA at 406H - 407B, 407H - 408A.

Bashall in reply.

Cur adv vult.

Postea (May 27).

Judgment

JAMES AJA: This is an appeal from an order of the Transvaal Provincial Division striking the name of the appellant from the roll of advocates. I shall refer to the appellant by his name henceforth in this judgment.

Fine was admitted as an advocate in 1974 and was a member of the respondent society until September 1979 when he resigned as a member but continued to practise as an advocate, doing *pro Deo* defences for the most part.

Fine's estate was sequestrated early in September 1979 and, as a result of facts that then came to light, the Bar Council conducted an

inquiry into his conduct, and thereafter decided to make an application to Court for his removal from the roll of advocates.

The information which the Society relied upon in its application to Court was contained in Fine's written statement to the Society. This statement is well summarized in the judgment of NICHOLAS J in the Court *a quo* in the following passage:

"During 1979 Fine travelled to Europe together with his father, a Johannesburg attorney. Fine himself was *en route* to Israel. In Antwerp he and his father met clients of the father, who were a man named Wawrzyniak and his partner. They consulted Fine's father in connection with the operation of a certain gaming table which they wished to introduce in Johannesburg. Fine's father informed the partners that,

notwithstanding the opinion of a professor and certain judgments which were shown to him, there was no prospect of their being permitted to operate such table in Johannesburg. Fine then suggested that there was a possibility of operating either in Swaziland or in Bophuthatswana. Wawrzyniak and his partner were interested and suggested that Fine should accompany them to these territories. They said that they would reimburse him with the costs of his flight to Israel, that they would pay all his hotel expenses and that they would make it worth his while as they were prepared to pay to him in addition a substantial sum in cash. After consideration Fine agreed. He was given a refund of his airfare to Israel and his hotel expenses in Antwerp were paid and he was given a substantial sum of money, the amount of which he does not however disclose.

Fine and one of the partners came to South Africa. On their arrival Fine made arrangements for the partner accompanying him to meet certain officials in Bophuthatswana. He said in his statement that he was not doing any legal business; all that he had to do was to introduce the person who had accompanied him to officials in Bophuthatswana. After they returned from Bophuthatswana the partner from Antwerp left.

The other partner, Wawrzyniak, arrived in Johannesburg shortly afterwards. He booked in at the Carlton Hotel from where he contacted Fine. While Wawrzyniak was in Johannesburg Fine met him frequently. They had meals together and they became very friendly. On 12 March 1979, when Fine dined with Wawrzyniak, the latter informed him that he was busy negotiating the lease for premises in Hillbrow and that he would have to deposit an amount sufficient to cover the initial period of six months which would amount to just under R10 000. Wawrzyniak informed Fine that he had not the available finance with him but that this money would be sent by him from Antwerp and that as he trusted Fine he would prefer to forward the money to him and that Fine should pay out the monthly rental for him. Wawrzyniak further informed Fine that he was engaging a certain Mr Reyneke to effect interior decoration in the premises and that he would also forward to Fine moneys to be paid to Reyneke. Fine suggested that the lessor's representative, a Mr Dritz, an attorney who was not in practice, should call at Fine's chambers to sign the lease after 5 pm on 13 March.

On that day Fine was in court but late in the afternoon he returned to his chambers where Dritz arrived and told him that the lessee, that is, Wawrzyniak, had had to leave that morning urgently for Antwerp but that he had left authority for Fine to sign the lease on his behalf. Fine perused the lease, and after making certain alterations, signed it on behalf of Wawrzyniak.

The lease provided in clause 2 that it should be deemed to have commenced on 15 March 1979 and should endure for a period of six months terminating on 14 September 1979. In terms of clause 3, the rental payable by the lessee to the lessor calculated from the date of commencement as described in clause 2 was the sum of R1 570 per month for the initial period of six months, with increases during successive option periods. Clause 12, as amended by Fine, provided as follows:

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> **'It shall be a special condition of this lease that within three days of signature of same, a letter be provided by Hilton Fine of National Board House c/r Kruis and Pritchard Streets, Johannesburg to the effect that sufficient funds have been lodged with him in his account to cover the rental due for the initial period of the lease. Such guarantee to be supplied is to be on the terms that the funds lodged as aforesaid may only be utilized for payment of rent in terms of this lease agreement and may not be liquidated in any other manner whatsoever save with the consent of the lessor or, alternatively, in the event of a dispute arising out of this lease and then upon the order of an appropriate court having jurisdiction, to make such order in terms of this lease.'**

The words underlined were added by Fine in manuscript and the deletions were effected by Fine. This was done in Fine's chambers on the afternoon of 13 March 1979.

On the following day, Dritz telephoned Fine, and although three days had been allowed in terms of clause 12 for the furnishing of the letter, Dritz stated that the lessor wanted the letter immediately as the lease commenced on 15 March 1979. Fine was now in a difficulty. He was not in possession of the requisite funds. He had been told by Wawrzyniak that a bank draft was on its way but it had not arrived. Fine said in his statement that continued pressure was being brought upon him to furnish the letter and eventually he did so on 15 March 1979. A copy of the letter which is annexed to the founding affidavit is not quite complete. The address has been cut off in part at the top but it seems clear that the letter was written on a letterhead of the kind used by Fine in his practice as an advocate. It is dated 15 March 1979 and it is headed 'Twistown Property Co (Pty) Ltd'. It reads:

'Dear Sirs,

Re: Lease between yourselves & L Wawrzyniak

This serves to confirm that I am holding sufficient funds on behalf of Mr Wawrzyniak for the initial period of the abovementioned lease in terms of clause 12.

Yours faithfully,

H B Fine.'

Fine says in his statement that when he did not obtain the funds he expected from Antwerp, he paid the first month's rent amounting to R1 570 out of his personal funds, but when rent fell due in subsequent months he was unable to make payment. He then submitted to the lessor's attorneys an offer of payments at the rate of R500 per month which would be guaranteed by Fine's father. This offer was refused. Summons was issued against Fine for arrear rentals. Fine did not enter an appearance and a default judgment was taken. This was followed by the application for the sequestration of Fine's estate."

The respondent's main grounds for contending that Fine was not a fit and proper person to continue to practise as an advocate are set out in para 8 of its founding affidavit, which reads as follows:

"**8.8.1 It is submitted that it is apparent from the aforesaid statement (annexure B) that the respondent, when writing the letter referred to therein (annexure C), knew:**

8.1.1 that the facts therein stated were false; and

8.1.2 that Twistown was aware that he, the respondent, was a practising advocate and for this reason was prepared to accept his assurance that he was holding the funds referred to in the said letter.

8.2 It is further submitted that it appears from the aforesaid statement (annexure B) that the respondent, after having ascertained that the monies referred to in the said letter (annexure C) had not been sent to him and would not be sent to him, failed to apprise Twistown of the true position and continued to allow them to labour under the misapprehension, induced by him, that the money had been received by him and was being held by him.

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8.3 It is further submitted that it is apparent from the aforesaid statement (annexure B) that the respondent, whilst practising as an advocate, was actively engaged for reward in acting as an adviser to an agent for certain Wawrzyniak and his partner in relation to the exploitation of certain gaming tables. In so doing he was acting in contravention of rule 4.19.1 of the Professional Regulations of the Society which reads as follows:

> **'A member of the Bar is not entitled to practise as an advocate while actively engaged in the carrying on of any other professional or commercial or industrial undertaking. A practising member of the Bar may be a director, but not the managing director, of a limited liability company engaged in such an undertaking. A practising member of the Bar is not entitled to accept salaried employment which may affect his professional independence.'"**

Fine made no attempt to reply factually to the allegations upon which these submissions were based and simply stated that he contested the correctness of the submissions and that appropriate argument would be addressed to the Court at the hearing of the matter. The inference is clear that he did not challenge the factual allegations because he could not.

Fine conceded that it was extremely unwise and indeed foolish of him to have written the letter to Twistown but asked the Court to take into account that this was an isolated occasion. He also asked the Court to give weight to a number of personal factors, the most important of which were that his estate had been sequestrated, that his health had suffered, and that he had been performing a useful function in undertaking *pro Deo defences which could not always be placed with members of the Bar; and in support of his good conduct he*

produced testimonials from the Chief Justice of Swaziland and from the Deputy Attorney-General in Johannesburg. He maintained that there was no chance that a similar situation (ie a situation which would induce him to write a fraudulent letter) would occur in the future and that the practice of law was his chosen career and all that he was qualified to do.

The Court *a quo* however came to the ultimate conclusion that Fine was not a fit and proper person to continue to practise as an advocate and ordered his name to be removed from the roll.

Section 7 (1) (*d*) of the Admission of Advocates Act 74 of 1964 provides that a Court must first decide whether or not the advocate whose conduct is under review is a fit and proper person to continue to practise as such. And, secondly, if he is not, to decide whether to suspend him from practice or order his name to be struck from the roll.

The first of these matters must be decided on a balance of probabilities, and this Court on appeal will investigate whether or not the finding of the Court *a quo* was correct and will set it aside if it is not. However the second matter (ie whether the advocate should be suspended from practice or should have his name struck from the roll) is one for the Court *a quo* to decide in the exercise of its discretion, and the Appeal Court will only interfere with the exercise of this discretion on the grounds of material misdirection or irregularity, or because the

decision is one no reasonable Court could make. (See *Nyembezi v Law Society, Natal* 1981 (2) SA 752 (A) .)

In regard to the first of these matters I consider that the Court *a quo* was correct in coming to the conclusion that Fine was not a fit and proper person to continue to practise as an advocate. The letter he wrote to Twistown on 15 March 1979 was undoubtedly fraudulent, as Fine falsely stated that he was holding sufficient funds on behalf of Mr Wawrzyniak for the initial period of the lease, when he knew that this was not true. He himself had signed the lease on behalf of Wawrzyniak on 13 March 1979 after discussing the matter in his chambers with an attorney named Dritz who represented Twistown, and he arranged for the draft lease to be amended to provide that he was to furnish Twistown with a letter within three days of the signing of the lease to the effect that sufficient funds had been lodged with him to cover the rental due for its initial period. When he provided the confirmatory letter he was deliberately fulfulling an obligation that he had assumed when he signed the lease. The letter was written in his chambers and its despatch was not an impulsive or ill-considered act. He was deeply involved with Wawrzyniak and his associates and had received substantial payments from them, and it is I think clear that when he signed the letter knowing that no money had arrived from Wawrzyniak he intended not only to protect Wawrzyniak and his associates but in addition to improve his own prospects of future payments from them. Dritz knew Fine was an advocate, the discussions regarding the lease took place in his chambers and in view of Fine's failure to put forward any facts pointing to a different conclusion the inference is clear that Fine was aware that Twistown was prepared to accept his assurance that he was holding Wawrzyniak's funds because he was a practising advocate. In addition it is clear that his conduct was in breach of rule 4.19.1 of the

Professional Regulations of the respondent Society.

Lastly, it is plain that when Fine became aware that Wawrzyniak was not going to send him the money he had promised and that he did not intend to fulfil his obligations under the lease, Fine failed to contact Twistown and apprise it of the position. He should have done so in order to lessen the injury he had inflicted upon it, but it is plain that he did not. In my view this is another example of his improper conduct.

In the light of these facts I have no doubt that the Court *a quo* was correct in concluding that Fine was not a fit and proper person to continue to practise as an advocate.

It was submitted by Fine's counsel that the Court *a quo misdirected itself by overlooking that it had an option either to strike Fine's name off the roll or to suspend him from practise for a period, and that it failed to consider the latter option.*

If the judgment of NICHOLAS J which was given *ex tempore* is read as a whole, I have no doubt that he was fully aware of what the Court's options were. In his judgment NICHOLAS J set out the terms of s 7 (1) of Act 74 of 1964 dealing with the Court's power to strike off or suspend,

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so it is idle to suggest that the Court overlooked its powers in this regard. Furthermore the learned Judge expressly referred to passages in the judgment in the case of *Society of Advocates of South Africa (Witwatersrand Division*) v *Cigler 1976 (4) SA 350 (T) at 358 which dealt with the question whether the advocate in question should be struck off or suspended from practice.*

It is in my view clear that the Court *a quo* examined Fine's history subsequent to the writing of the letter to Twistown and decided that insufficient material had been laid before it and insufficient time had elapsed to lend credence to Fine's statement that he had reformed. There can be no doubt in my mind that the Court took a very serious view of Fine's conduct in subordinating his duty as an advocate to the interests of his associate Wawrzyniak, and that it considered that it would not be possible, in view of the facts that had been revealed, to rely with any confidence upon his integrity. In these circumstances the Court *a quo* decided that its proper course was to strike Fine's name off the roll of advocates rather than to suspend him from practice.

In my view there are no grounds for holding that his decision was incorrect.

The appeal is dismissed with costs (excluding the fees of both counsel).

RABIE CJ, CILLIÉ JA, VILJOEN JA and BOTHA JA concurred.

Appellant's Attorneys: *Getz, Behr, Ogus & Mendel Cohen*, Pretoria; *Lovius, Block, Meltz, Steyn & Yazbek*, Bloemfontein. Respondent's Attorneys: *Friedland, Hart & Partners*, Pretoria; *McIntyre & Van der Post*, Bloemfontein.