SOCIETY OF ADVOCATES OF SA (WITWATERSRAND DIVISION) v FISCHER 1966 (1) SA 133 (T)

Citation	1966 (1) SA 133 (T)
Court	Transvaal Provincial Division
Judge	De Wet JP, Hill J and Boshoff J
Heard	October 28, 1965
Judgment	November 2, 1965
Annotations	

Flynote : Sleutelwoorde

Advocate - Removal from roll - Practising member defying laws of the country - Estreatment of bail - Such conduct dishonest - Matters to which Court can have reference - Extent of.

Headnote : Kopnota

It is inconsistent with the duty of the Court, whose duty it is to uphold and enforce the laws of the country duly enacted and promulgated, to allow an advocate to remain on the roll when he is defying these laws and instigating others to do likewise.

While the respondent, a senior proctising advocate, was on trial on certain charges of contravening Act 44 of 1950, he estreated his bail. In an application, whilst he was still at large, to remove his name from the roll of advocates,

Held, that the breach by the respondent of his solemn assurance that he would stand his trial was dishonest conduct.

Held, further, that if conduct of this nature on the part of a senior and respected officer of the Court were to be overlooked as venial, the impact on the administration of justice would be deplorable: no one released on bail could be expected to regard his undertaking in his recognisance as binding upon him and not lightly to be breached, and judicial officers would be in a quandary in every case where application for bail was made.

Held, further, that the Court could take cognisance of conduct of the respondent not relied upon by the applicant nor referred to in the notice to the applicant of the proceedings, which notice had, by order of Court, been published in a newspaper.

Held, further, that the application should be granted with costs.

Case Information

Application for the removal of the respondent's name from the roll of advocates. The facts

appear from the reasons for judgment.

D. J. Shaw, Q.C. (with him *R. C. C. Feetham)*, for the applicant.

S. Kentridge (with him *A. Chaskalson)*, for the respondent.

Cur. adv. vult.

Postea (November 2nd).

Judgment

DE WET, J.P.: The Court is faced with the unpleasant duty of giving a decision on an application for disciplinary action against the respondent, who is well known to the members of the Court, firstly as a colleague in practice at the Bar, and later as a senior advocate appearing before this Court.

The respondent, together with 13 others, appeared before a regional magistrate on 24th September, 1964, on three counts alleging contraventions of Act 44 of 1950. The first count alleged that the accused were office bearers or members of an unlawful organisation, to wit the South African Communist Party. The second count alleged unlawful activities in respect of the said unlawful organisation, and the third count alleged acts calculated to further the achievement of the objects of Communism.

On the date mentioned, application was made for bail for the respondent and for No. 2 accused. The respondent gave evidence which may be summarised as follows: that he had no intention of leaving the country; that he did not fear the trial; that even the expectation of conviction would not induce him to leave the country; that he had no intention of avoiding prosecution; that he was a practising advocate with a status of senior counsel; that he had been chairman of the Bar Council; that if he was given permission to proceed overseas he would return in order to stand his trial and that he was prepared to furnish any guarantees required.

Counsel who appeared for the respondent stated, presumably with his authority:

> 'And, I am safe in saying that Mr. Fischer's colleagues at the Bar are confident of the fact that Mr. Fischer, no matter what he is charged with here, is the sort of man that will stand his trial and they equally would put up any sum of money at all, no matter how large it is, to guarantee his return.'

It appears that the respondent had been briefed to attend a sitting of the Privy Council. The attorney who had briefed him, the latter being an old and respected member of that profession, also gave evidence to the effect that he had known the respondent personally and professionally for over 20 years, that he had absolute faith in his integrity and would take his word for anything and would accept any undertaking given by him unhesitatingly.

In giving judgment the magistrate said, *inter alia*, that the respondent was a son of our soil,

an advocate of standing in this country, and then referred to the fact that the authorities had been induced to issue a passport to enable the respondent to argue an appeal before the Privy Council in a matter in which he had been engaged for a considerable time. The magistrate said fur her that the respondent had given a solemn assurance that he would not abscond, and for these reasons bail would be allowed.

The respondent in fact did go overseas, and he returned in order to stand his trial. The trial commenced on 16th November, 1964, and the first witness called was one Byleveld, who was warned as an accomplice and gave evidence to the effect that he had been a member of a branch committee of the Communist Party in 1961, and in 1963 became a member of the central committee and that the respondent was a member of this committee. He gave evidence at great length in relation

to the activities of the Communist Party and the part played by the respondent and others of the accused. The following witness of importance, as far as the respondent is concerned, was one Ludi, a warrant officer attached to the security police who, according to his evidence, had joined the underground Communist Party in order to investigate its activities and who, according to his evidence, had obtained a great deal of information which he periodically and secretly transmitted to his superiors in the Police Force. This witness also gave evidence at great length and seriously implicated the respondent; furthermore he disclosed that recordings had been taken by means of concealed microphones of conversations between some of the accused with each other and with other members of the Communist Party. Both these witnesses were subjected to lengthy cross-examination.

By 25th January, 1965, a good deal of the State evidence had been completed. At this time it must have been clear to the respondent that he had a very strong case to meet. On this date the respondent did not appear, but his counsel informed the Court that he had received a letter from the respondent which he read out to the Court. Some relevant extracts from this letter are the following:

> 'By the time this reaches you I shall be a long way from Johannesburg and shall absent myself from the remainder of the trial. But I shall still be in the country to which I said I would return when I was granted bail. I wish you to inform the Court that my absence, though deliberate, is not intended in any way to be disrespectful. Nor is it prompted by any fear of the punishment which might be inflicted on me. Indeed I realise fully that my eventual punishment may be increased by my present conduct . . . My decision was made only because I believe that it is the duty of every true opponent of this Government to remain in this country and to oppose its monstrous policy of apartheid with every means in its power. That is what I shall do for as long as I can . . .
>
> There are already over 2,500 political prisoners in our prisons. These men and women are not criminals but the staunchest opponents of apartheid . . .
>
> If by my fight I can encourage even some people to think about, to understand and to abandon the policies

they now so blindly follow, I shall not regret any punishment I may incur.

I can no longer serve justice in the way I have attempted to do during the past thirty years. I can do it only in the way I have now chosen.'

This letter is dated 22nd January, and a further letter, dated 4th February, 1965, was written to his counsel. Relevant extracts from this letter are as follows:

'I have been following the Press and have seen the reports of a decision in terms of which it is said that the Johannesburg Bar Council intends applying to Court in order to have my name struck off the roll of advocates.

I assume that the sole reason for the decision is that I deliberately absented myself from my trial and estreated my bail.

The principle upon which I rely is a simple one, firmly established in South African legal tradition. Since the days of the South African war, if not since the Jameson Raid, it has been recognised that political offences, committed because of a belief in the overriding moral validity of a political principle, do not in themselves justify the disbarring of a person from practising the profession of the law. Presumably this is because it is assumed that the commission of such offences has no bearing on the professional integrity of the person concerned.

When an advocate does what I have done, his conduct is not determined by any disrespect for the law nor because he hopes to benefit personally by any 'offence' he may commit. On the contrary, it requires an act of will to overcome his deeply rooted respect of legality, and he takes the step only when he feels that, whatever the consequences to himself, his political conscience no longer permits him to do otherwise. He does it not because of a desire to be immoral, but because to act otherwise would, for him, be immoral.

Though there have always been persons who have been prepared, by way of protest, to accept such punishment in respect of political crimes as might

be imposed by an independent Judiciary, this is not what we face in South Africa to-day. However independent and fair the Bench in my case, I was facing, if convicted, an 'indeterminate' sentence which would be imposed at the sole and unfettered discretion of the Minister of Justice. We have already seen how this type of sentence has been imposed upon Mr. Sobukwe and we have already seen how European public opinion in this country, to its lasting disgrace, has failed to register any protest against this arbitrary, indefinite incarceration and has complacently accepted this total abolition of the rule of law.

I do not pretend that I was unaware of these factors when I applied for bail. What I do say is that during the trial these and other factors caused me to change my mind as to the effectiveness of the protest upon which I had decided and compelled me to the view that any really effective protest would have to be made in a much sharper form - in an open defiance, whatever the personal consequences might be, of a process of law which has become a travesty of all civilised tradition: A political belief is outlawed, then torture is applied to gather evidence and finally the Executive decides whether you serve a life sentence or not.'

The reference to Sobukwe is a reference to sec. 10 (*a) bis* of Act 44 of 1950, as amended by sec. 4 of Act 37 of 1963, which empowers the Minister of Justice to cause a person to be detained in custody in certain circumstances after he has completed a term of imprisonment

imposed by a court of law. It is common cause that the Minister had not at any stage considered this provision in relation to the respondent, but that, in view of a statement made to the respondent by a colleague, he could well have had a fear that this provision would be applied in his case should he be convicted. It seems to me that the stress placed upon this fear is somewhat inconsistent with his protestations that he did not abscond through any fear of punishment.

Notice of the present proceedings was given to the respondent by publication on 30th June in a newspaper in pursuance of an order of this Court, and that the respondent is well aware of these proceedings is clear from the letter of 4th February, to which I have already referred, and from a subsequent letter which he wrote to attorneys dated 9th July asking them to act for him. In fact the respondent has put before the Court, in the letters mentioned, a full argument in relation to the complaints against him and a detailed explanation of his conduct which he attempts to justify.

The Court is indebted to Mr. *Shaw*, who appeared for the Society of Advocates, and Mr. *Kentridge*, who appeared for the respondent, for the helpful arguments in relation to the difficult and painful matter with which the Court has to deal.

It is contended that the respondent's breach of faith in estreating his bail is, firstly, conduct not related to his profession as an advocate and, secondly, should not be stigmatised as dishonourable conduct.

I regret that I cannot agree with either of these submissions. It is clear that the respondent made full use of his status as a senior counsel in inducing the magistrate to grant bail, and his breach of his solemn assurance can clearly be stigmatised as dishonest conduct. In this respect I can see no distinction between the words 'dishonest' and 'dishonourable'. In addition there is a further consideration which must not be overlooked: that is the impact of conduct of this nature upon public opinion. If conduct of this nature on the part of a senior and respected officer of the Court were to be overlooked as venial, the impact on the administration of justice would be deplorable. No one released on bail could be expected to regard his undertaking in his recognisance as binding

upon him and not lightly to be breached, and judicial officers would be in a quandary in every case where application for bail was made.

It is further contended that the Court should not take cognisance of any conduct of the respondent not relied upon by the applicant and not referred to in the notice published in the newspaper.

I do not agree with this contention, As in the case of *Pretoria Bar Council v Beyers, *(1)*

decided by this Court recently, the conduct of the respondent in relation to the application made against him and the facts emerging from his explanation to the Court may be of considerable relevance,

In the present case the letters of the respondent, together with his absconding from his trial, clearly lead to the inference that not only was he guilty of subversive conduct in the past but that he intends continuing such activity and probably at the present time is still engaged in such activity. The respondent says:

> 'I can no longer serve justice in the way I have attempted to do during the past thirty years. I can do it only in the way I have now chosen.'

In saying this, the respondent in effect admits that he is not fit to remain on the roll of advocates, where it would be his duty to further the administration of justice to the best of his ability. He in effect admits that his political beliefs are such that he is not prepared to conform to the laws of his country. It is the duty of the Court to uphold and enforce the laws of the country duly enacted and promulgated. It would be inconsistent with that duty for the Court to allow an advocate to remain on the roll when he is defying these laws and instigating others to defy these laws.

Considerable reliance was placed by the respondent on the decision of this Court in *Incorporated Law Society, Transvaal v Mandela,* 1954 (3) SA 102 (T) , where the respondent, an attorney, had been convicted of subversive activity but the Court nevertheless did not take any disciplinary action. The case is in any event distinguishable, inasmuch as the Court was apparently of the view that the respondent had been punished for his unlawful activity, which had ceased and was not likely to recur (a wrong view, as it turned out). But I would also say, with respect, that the Court appears to have overlooked the fact that it is the duty of an attorney to further the administration of justice in accordance with the laws of the country and not to frustrate it.

Reliance was also placed on the decision in *Ex parte Krause*, 1905 T.S. 221. The applicant in that matter had been enrolled as an advocate in the High Court of the South African Republic. At a time when the applicant was a prisoner on parole he was convicted in England of an attempt to incite the commission of the crime of murder and was later disbarred by the Benchers of his Inn. That application was, in my opinion, analogous to an application for readmission by an applicant who had previously been struck off the roll. SOLOMON, J., said, at p. 232:

> 'The policy in this country, as expressed in Ord, 22 of 1903, has been as much as possible to wipe the slate clean, and not to attach too much importance to acts committed under such circumstances. I think we are justified in acting in the same spirit as that in which the Government have acted, and as much as possible drawing a veil over the acts which were committed during the course of the war; and it is considerations of that nature which lead me to the conclusion that we are entitled to say that the character of the applicant is not such as would justify us in refusing to admit him to the ranks of the Bar.'

DE WET JP

If the respondent were to apply for readmission at some future time, similar considerations may apply. It is impossible for this Court to foresee what will happen in the future. We are concerned with the laws in force at the present time and with the structure of society as it exists in this country at the present time.

Finally it was suggested that the Court should suspend the respondent from practice for an indefinite period rather than order his name to be removed from the roll of advocates. Cases where this type of order was made occurred in the Cape Province during the war at the beginning of this century (see e.g., *Incorporated Law Society v Vermooten*, 17 S.C. 312), but in my opinion this type of order is not appropriate in the present case.

It is ordered that the name of the respondent be removed from the roll of advocates, and the respondent is ordered to pay the costs of the applicant.

HILL, J., and BOSHOFF, J., concurred.

Applicant's Attorneys: *Edward Nathan, Friedland, Mansell & Lewis.* Respondent's Attorneys: *Bell, Dewar & Hall.*