SWAIN v SOCIETY OF ADVOCATES, NATAL 1973 (4) SA 784 (A)

Citation	1973 (4) SA 784 (A)
Court	Appellate Division
Judge	van Blerk JA, Rumpff JA, Potgieter JA, Jansen JA and Rabie JA
Heard	September 6, 1973
Judgment	September 28, 1973
Annotations	

Flynote : Sleutelwoorde

Advocate - Admission of - Trial Court finding applicant not a fit person to be admitted - Appeal Court confirming finding.

Headnote : Kopnota

The appellant had applied for his admission as an advocate. The Court found on the evidence that he was not a fit person to be admitted and refused the application. In an appeal,

Held, that the Court would only interfere with the exercise of the discretion of the Court *a quo* if the findings of fact were wrongly made.

Held, further, that the appellant had not shown facts which justified the Court in interfering with the discretion of the Court *a quo.*

The decision in the Natal Provincial Division in *Swain v Society of Advocates, Natal*, 1973 (2) SA 427, confirmed.

Case Information

Appeal from a decision in the Natal Provincial Division (JAMES, J.P., and LEON, J.). The facts appear from the judgment of VAN BLERK, J.A.

H. Shakenovsky, for the appellant: It is conceded that appellant is required to satisfy the Court that he is a fit and proper person to be admitted to practice as an advocate. Sec. 3 *(a)* of Act 74 of 1964. Similarly, a Court may suspend a person from practice as an advocate, or order that his name be struck off the roll of advocates if the Court is

satisfied that he is not a fit and proper person to continue to practise as an advocate. Sec. 7 (1) *(b)* of the Act. It is conceded that both with regard to the admission of an advocate as

also his suspension or striking off, the Court has a discretion. *Olivier v Die Kaapse Balieraad*, 1972 (3) SA at p.495D; *Beyers v Pretoria Balieraad*, 1966 (2) SA at p. 605G. An Appeal Court will interfere with a decision of a Court *a quo* refusing admission of an advocate where it appears that: *(a)* the findings of fact by such Court were wrongly made, see *Olivier v Die Kaapse Balieraad, supra*, and/or *(b)* that such discretion was exercised arbitrarily or on a wrong principle, or no reasonable and sound grounds existed for the Court's decision. See *Olivier's* case, *supra* at p. 495E; *Beyers v Pretoria Balieraad, supra*. Whilst it is conceded that the *onus* of proof of so satisfying the Court that he is a fit and proper person to be admitted as an advocate rests upon the applicant (appellant), he need do so only on a balance of probabilities. However, as the respondent opposes the appellant's admission on the grounds that he is not a fit and proper person in that he has been guilty of alleged misconduct in the various respects set out in the record, the Court will not lightly find that appellant was guilty of misconduct. See *Olivier's* case, *supra* at p. 496G - H; *Gates v Gates*, 1939 AD at p. 155. Alternatively, no adverse inference should be drawn against the appellant by reason of the questions put by his counsel, in view of appellant's evidence that he had furnished counsel with a written statement which had been destroyed together with all the files. *(a)* The manner of conduct and control of a trial rests with counsel, *R.*v. *Matonsi*, 1958 (2) SA at p. 456. *(b)* The advocate, although the mouthpiece of his client, is not a mere conduit pipe. *S.* v *Moseli,* 1969 (1) SA at p. 649C. *(c)* The client and the advocate cannot both ask questions, and cannot take part side by side with his counsel in the examining of witnesses. *R.* v *Baartman*, 1960 (3) SA head-note p. 535H and at p. 538A - B; *S.* v *Moseli, supra* at p. 649C. An attorney's duty to his client depends on what he, the attorney, is employed to do. See *Honey & Blanckenberg v Law*, 1966 (2) SA at p. 46E; *Clark v Kirby Smith*, 1964 All E.R. at p. 877G - H. The relationship between an attorney and client is a contractual one based on his mandate and appellant was in these circumstances giving effect to the terms of the contract which subsisted between himself and Wulfes from the beginning. *Bruce, N.O.* v *Berman*, 1963 (3) SA at p. 23G. As appellant made a full disclosure of the position to Wulfes when appellant accepted the mandate, no such duty would arise. *Preller and Others v Jordaan*, 1956 (1)S.A. at p. 506A - B. Wulfes was not prejudiced in that he did sue appellant and elected to settle his claim against appellant. Where no loss has resulted to a client this is a strong factor in appellant's favour. *Ex parte Caminsky*, 1958 (3) SA at p. 249 - A - B. Alternatively, if at the time appellant signed the deed of settlement and when he obtained the indemnity he should not have been acting as attorney for Wulfes, by reason of there being a conflict of interests, then by reason of appellant's specific mandate from Wulfes, and having regard to all the circumstances, appellant's behaviour would be an error of judgment and would not thereby render him unfit for admission

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as an advocate. *Honey and Blanckenberg v Law*, 1966 (2) SA at p. 47A. It is sometimes a

question of degree and it is difficult to say whether a breach of duty has or has not been committed. *Honey's* case, *supra* at p. 47A - B. Where the conduct of an attorney is ill-advised and he has been guilty of an error of judgment, in the absence of an ulterior motive the Court did not strike him off the roll but merely reprimanded him severely. See *Cape Law Society v Vorster*, 1949 (3) SA at pp. 425 - 6. The Court *a quo* erred in holding that, because it found appellant to be untruthful in the affidavits filed by him and in the evidence that he gave at the trial, this was in itself a ground for holding that appellant was not a fit and proper person to be admitted to practice as an advocate. *Olivier's* case, *supra* at pp. 499, 500C - D; *Incorporated Law Society v De Jongh*, 1909 T.S. at p. 498. Throughout a long career as an officer of the Court lasting from 1947 until 1972 (some 25 years) appellant's career was without blemish and this conduct should be seen as 'a fall from grace'. *Ex parte Gunguluza*, 1971 (4) SA at p. 213C. The same principles apply to the admission of an advocate (or an attorney) as do to his re-admission. See *Ex parte Knox*, 1962 (1) SA at p. 782G - H; *Ex parte Gunguluza, supra*. Therefore the Court will only in 'exceptional cases' refuse the admission of an advocate on the grounds that he is not a fit and proper person to be so admitted. See *Ex parte Knox, supra* at p. 784C - D.

D. J. Shaw, Q.C. (with him *J. B. Talbot)*, for the respondent. The *onus* of proving that he is a fit and proper person to be admitted as an advocate is upon the appellant. He must 'satisfy the Court'. Sec. (1) *(a)* of Act 74 of 1964. The finding of the Court *a quo* that the appellant 'has failed to show that he is a fit and proper person to practise as an advocate' is correct. The appellant's lack of truthfulness, apart from anything else, is a fatal barrier to his admission as an advocate. The simple fact seems to emerge that, if the appellant were admitted, the Court could never implicitly trust in or believe what it was told by him from the Bar. Allied to the appellant's untruthfulness is his breach of good faith in failing to disclose a relevant and material fact to the Court in his replying affidavit. Cf. *Ex parte Cassim*, 1970 (4) SA 476. As to the general approach, see *Ex parte Knox*, 1962 (1) SA at p. 784G.

Shakenovsky, in reply.

Cur. adv. vult.

Postea (September 28th).

Judgment

VAN BLERK, J.A.: This is an appeal against the judgment of the Natal Provincial Division (JAMES, J.P., and LEON, J.) refusing the appellant's application to be admitted to practise as an advocate. The respondent, the Society of Advocates of Natal, opposed the application. In concluding that the appellant is not fit to be so admitted the Court *a quo* exercised a discretion with which this Court will only interfere upon recognised grounds which were recently restated in *Olivier v Die Kaapse Balieraad*, 1972 (3) SA 485 (AD) at p. 495. This

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Court will, for instance, interfere where the findings of fact on which the decision was based were wrongly made.

In terms of sec. 3 *(a)* of the Admission of Advocates Act, 74 of 1964, the *onus* is on the appellant to show that he is a fit and proper person to be admitted to practise as an advocate. This *onus* will be discharged on a preponderance of probability (*Olivier's* case at p. 496).

The approach mentioned at p. 496G - H of *Olivier's* case does not in the instant case require consideration as it is not, in view of the facts of this case, a crucial issue.

The only dispute is whether the Court *a quo* erred in its findings of fact. It is trite that in resolving a dispute of this kind, where the issue depends upon oral evidence, the opinion of the trial Court will not lightly be disturbed on appeal. To succeed the appellant in the instant case will be required to show that there were no grounds which could reasonably justify the exercise of a discretion against the appellant. It is not necessary to detail the evidence on which the Court a quo based its conclusion that the appellant is not fit for admission. The evidence has been fully dealt with in the reported judgment at 1973 (2) SA 427 (N) .

In his opposing affidavit the chairman of the respondent Society, Mr. Feetham, disputed the appellant's allegation in his affidavit in support of his application for admission that he is a fit and proper person to be admitted. The appellant filed a replying affidavit and a supporting affidavit by one Pretorius, hereinafter referred to as Pretorius. As suggested by Mr. Feetham in his affidavit the appellant gave evidence and submitted to cross-examination.

In expressing a doubt whether the appellant is a fit person to be admitted Mr. Feetham referred the Court to objectionable conduct by the appellant when he was still a practising attorney. This conduct relates to his dealings with a client named Wulfes and to conduct in regard to two other matters, *(a)* a company referred to as Supertune Service and *(b)* Davies & Barrow (Pty.) Ltd.

As pointed out by the Court *a quo* in its judgment the appellant's conduct in the matter of Wulfes is the most serious. According to the opposing affidavit the grounds for doubting whether the appellant is fit to be admitted are, in connection with the matter of Wulfes, (1) the suspicion that the appellant, who procured *(a)* a written agreement which contains a release from payment of a certain amount by Pretorius who was a client of the appellant, and *(b)* a document called an indemnity, did so procure these documents to protect his own interests at the expense of Wulfes, his client at the time, and (2) that the appellant acted *mala fide* when he procured the release and the indemnity which were advantageous to his client Pretorius and seriously prejudicial to his client Wulfes.

Wulfes was injured in a motor collision while he was a non-fare paying passenger in a motor car driven by Pretorius. The appellant caused a summons to be issued on behalf of Pretorius and members of his family against the insurer of the other motor car involved in the accident. Subsequent thereto the appellant agreed to act for Wulfes as well, and instituted action on the latter's behalf against the insurance company; but, as he had failed to give notice of Wulfes' claim to the

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insurance company within the period prescribed by the Motor Vehicle Insurance Act, a plea of prescription was filed. Thereupon the written agreement, the release referred to above, was entered into between the parties in the pending action, that is the action of Pretorius and members of his family against the insurance company. This agreement which bears the title 'Terms of settlement' provides that the insurance company would pay certain sums to Pretorius and the members of his family subject to certain conditions and that if the plea of prescription failed, Pretorius was to be joined as a second defendant. This agreement was on 30th October, 1968, signed by the appellant in his capacity as the plaintiff's attorney, in his capacity as the attorney for Wulfes and in his personal capacity. On 8th November, 1968, the appellant, accompanied by Pretorius and one Hillermann, proceeded to Wulfes' farm where he obtained the latter's signature to the document above referred to as the indemnity. This document contains an undertaking by Wulfes

> 'to release and indemnify Pretorius from payment of any monies as the result of any apportionment which may be made by the Supreme Court against Pretorius to the extent of such apportionment only'

in the action which he (Wulfes) had instituted against the insurance company.

The plea of prescription was upheld. Wulfes thereupon sued the appellant for damages arising out of the latter's failure to serve timeous notice of the former's claim on the insurance company. The appellant's plea to Wulfes' declaration says the claim became prescribed solely as a result of Wulfes' own fault as he (Wulfes) refused to append his signature to the claim form which was presented to him for signature on 3rd or 4th February, 1968. An alternative plea alleges that if Wulfes' claim had not become prescribed, and damages had been awarded to him in the sum of R22 700, the company, in terms of sec. 2 (6) *(a)* of Act 34 of 1956 would have instituted action against Pretorius for a contribution to the extent of 75 per cent of the award, as that percentage was the degree of the latter's negligence. In the circumstances, as a result of the indemnity signed by Wulfes releasing Pretorius from payment of any damages, Wulfes' claim had to be reduced by 75 per cent to R6000 odd. After four days' hearing and before Wulfes was cross-examined the appellant settled Wulfes' claim at the figure of R6000. In his replying affidavit the appellant did not mention this settlement. In cross-examination as to the reason for not disclosing this fact the evidence reads as follows:

'Why was that not revealed to the Court? - I didn't think it was apposite or necessary Mr. *Didcott.*

Why did you settle Mr. Wulfes' claim Mr. Swain? - It was much against my will. Senior (counsel) who was conducting my case at the time, suggested that it would be better for me if I were to settle this claim and persisted in this attitude for four days whilst we were on trial. In the end I gave way. His argument was that if I ever were to apply to be admitted to the Bar that a case of this nature would automatically raise a grave doubt as to my suitability since the allegations that had been made against me.

So at all stages you realised that the allegations made against you by Mr. Wulfes are very important to the question whether or not you should be allowed to be admitted to the Bar? - Yes.

Now surely that being so, Mr. Swain, it was all the more reason for you to frankly reveal to the Court that you settled Mr. Wulfes' claim and to explain why you did? - I would have been quite happy to have done so.'

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It should be mentioned that Wulfes, who died after the aforesaid settlement was entered into, was described by Pretorius in his affidavit as a

'difficult old man who lived on a disability grant on a farm.... He had no money... He lived alone and very few people visited him apart from his family. I could see he would forfeit his right to compensation through his stubbornness and lack of money'.

The appellant explained that he was unwilling to act for Wulfes but was persuaded by both Pretorius and Wulfes to attend to the latter's claim for damages. His evidence is that it was in November, 1966, that he eventually agreed to act for Wulfes up to the stage of Court proceedings as he felt the matter could be settled without litigation. A letter dated 26th May, 1966, from the appellant's office and signed by one Streak on behalf of the appellant's firm, however, shows that in reply to a letter apparently signed by Wulfes, Streak wrote to the latter saying:

'We confirm that we will be only too willing to handle your third party claim when we have received full instructions from you.'

According to the appellant Wulfes throughout made it clear that he did not want to claim damages from Pretorius (they were friends); but when the MVA form was submitted to him for signature he refused to sign it as the figure reflecting his claim was too low; he wanted R1 000 000. On 2nd July, 1968 the appellant wrote to Wulfes advising that as anticipated the company took the point that the latter's claim had been filed after the expiry date. The letter concludes:

'If you desire to instruct another attorney you are perfectly at liberty to do so and we shall hand the papers over to them on your instructions.

Kindly give this matter your immediate attention, as the matter must now go to Court.'

The appellant offered the following explanation why he procured Wulfes' signature to the indemnity:

'... perhaps you can explain to their Lordships why precisely did you get him to sign this indemnity? - My Lords, after he had let me down, after his co-operation with me, and then letting me down like that, I wrote to him and said I wasn't going to act for him anymore, and Mr. Hillermann came in from Wartburg and asked me to please continue with it, and I told him that the damage had been done; the only way to try and sort it out was to test the special plea in court, the plea of prescription, and Hillermann then paid me, paid the costs of testing that thing in Court, and when Hillermann had done that, the three of us went out to see Wulfes to get his consent to this, and it was then that I - all along, on the way out I was talking to Hillermann and to Pretorius, and I was frightened that Wulfes would then turn again and sue Pretorius, because he knew full well, I had told him and explained to him, that the major portion of his claim lay against Pretorius, and he had agreed not to do it. Well if he could do what he did to me, I then said 'Right, we are going to get this in writing'.

JAMES, J.P.: So you say you got this in writing from Wulfes to protect your client Pretorius? - Yes, because he was agitated as well.

But wasn't Wulfes also your client? - Yes. When he had proved himself to be difficult then I thought I'd better protect Pretorius properly, because he would just deny that he had made this agreement and we would be in difficulties.

Well, shouldn't you at that stage have considered Wulfes - you had apparently gone back after Hillermann had paid the money and had agreed to act for Wulfes, hadn't you? - Yes.

Well then, weren't you acting directly against his interests by getting him to sign this agreement? - With submission, no My Lord. This was only confirming the agreement that we had made originally. I had already given it in writing so we couldn't go against it. And a week or two weeks later the special plea was tried and Wulfes then dropped us and changed his evidence with regard to the question of his unconsciousness, so I thought it was well taken.

But isn't the point perhaps this, that you went to Wulfes that day because Hillermann had paid the money so that you could represent him to test this plea? - Yes.

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So at that stage there is no question about it but that you were his attorney? - Yes.

And then you get him to sign a document which is designed to protect your other client, Mr. Pretorius? - Yes.

Now surely, would you say that's ethical? - My Lord, yes, it was merely confirming an agreement we had made. I only acted for Wulfes on that basis.

Mr. *Pitman:* Were Wulfes and Pretorius in fact related? - Yes, well I don't know about blood, but he called him Uncle Hymie, and they were very close.

Was your attitude that there had already been an agreement made in those terms, that Wulfes would not sue Pretorius? - My Lord, the only reason I would act for Wulfes was when he said that he would indemnify Pretorius.'

The Court *a quo* held that the appellant's failure to disclose in his affidavit the fact that he had settled Wulfes' action and to state why he had settled it, was a breach of the utmost good faith which the professions of advocate and attorney require from practitioners and aspirant practitioners. As the judgment points out these circumstances were material to the

question whether the failure timeously to file the claim was attributable to Wulfes' negligence or to that of the appellant. They would also seem to have a bearing on the question whether Wulfes ever gave a mandate to the appellant to release Pretorius.

There can be little doubt that the appellant, conscious of the abortive notice, procured Wulfes' signature to the indemnity to have Wulfes' possible claim for damages against himself reduced. It appears that matters reached a stage at which defendant realised that no time should be lost to procure the release and the indemnity. It is not without significance that the appellant, an attorney of long experience, signed an important document on behalf of his client without written authority so to do and purported to rely merely on a verbal 'express desire'. The part the appellant played in these transactions reeks with suspicion. As the Court *a quo* said, in persuading Wulfes to sign the indemnity the appellant acted gravely to Wulfes' prejudice and he procured the indemnity when he knew full well that there was a fundamental conflict of interest between Wulfes and Pretorius. Furthermore, bearing in mind that Pretorius was all along his client, he should in all the circumstances not have proceeded with Wulfes' action on the terms that Wulfes would abandon 75 per cent of his claim by not suing Pretorius. This conduct was rightly considered as unprofessional and regarded as an indication that appellant is not fit to be admitted.

In summing up the Wulfes matter the Court *a quo* stated that the appellant

> 'demonstrated in his evidence that he was reckless in his assertions and had no sense of responsibility towards the truth, and that whenever his evidence could be tested even his most positive assertions were shown to be unreliable'.

The appellant was considered a

> 'quick thinking man who only (had) to make an assertion to believe in its truth and to persist in it in the teeth of the overwhelming evidence to the contrary'.

The appellant's explanations in regard to the signing of the indemnity of Wulfes' release of Pretorius were found to be unconvincing and unacceptable.

In regard to this matter of Wulfes this Court was urged to hold that the evidence does not justify the inference that the appellant was motivated by the fear of a possible claim for damages by Wulfes against him. But as pointed out earlier this Court will be slow to disturb the factual findings by the Court *aquo* on oral evidence unless sound

reasons justify interference. The various criticisms levelled at the findings of fact do not warrant such a course.

As the appeal cannot succeed on the findings in respect of Wulfes' matter there is no point in expatiating on the appellant's conduct in regard to the remaining two matters of

Supertune Service and Davies & Barrow (Pty.) Ltd. It will suffice to say that there is no reason to interfere with the finding by the Court *a quo* that the appellant's evidence in these two matters reveals the same lack of responsibility towards the truth.

The appeal is dismissed with costs.

RUMPFF, J.A., POTGIETER, J.A., JANSEN, J.A., and RABIE, J.A., concurred.

Appellant's Attorneys: *Theron, Burger & Co.*, Pietermaritzburg; Van *de Wall, Leinberger, Potgieter & Coetsee*, Bloemfontein. Respondent's Attorneys: *Smythe & Co.*, Pietermaritzburg; *Goodricke & Franklin*, Bloemfontein.

APPENDIX

DIGEST OF CASES ON APPEAL.
