INCORPORATED LAW SOCIETY, TRANSVAAL v MANDELA 1954 (3) SA 102 (T)

Citation	1954 (3) SA 102 (T)
Court	Transvaal Provincial Division
Judge	Ramsbottom J and Roper J
Heard	March 24, 1954
Judgment	April 28, 1954
Annotations	

Flynote : Sleutelwoorde

Attorney - Misconduct - What amounts to - Attorney disobeying laws - Conviction does not necessarily disqualify attorney - Conviction of contravening sec. 11 *(b)* of Act 44 of 1950. - Conduct not dishonest, disgraceful nor dishonourable.

Headnote : Kopnota

While in certain circumstances an attorney may be expected to observe the laws more strictly than other persons, the fact that an attorney has deliberately disobeyed the law does not necessarily disqualify him from practising his profession or justify the Court in removing his name from the roll.

The respondent, a practising attorney, had been convicted of contravening section 11 *(b)* of the Communism Act, 44 of 1950, the charge alleging that he had advocated and encouraged a scheme which aimed at bringing about certain social and political changes such as the repeal of the pass laws, the laws which enforce the segregation of the races and the laws which restrict non-European franchise, by the unlawful means of disobedience of certain laws. In an application for his removal from the roll of attorneys,

Held, that the offence committed by the respondent had nothing to do with his practice as an attorney.

Held further, as the respondent's conduct was not dishonest, disgraceful or dishonourable, that the application should be refused.

Case Information

Application for an order removing the respondent's name from the roll of attorneys. The facts appear from the reasons for judgment.

P. F. O'Hagan, Q.C. (with him *I. L. Grindley-Ferris)*, for the applicant: For particulars of the charge, see *R v Sisulu and Others*, 1953 (3) SA 276 at p. 283 (A.D.). Respondent has put nothing before the Court which in any way mitigates his conduct. The Court must therefore

assume that he did the act with full knowledge and in defiance of the law. As to the view taken by the Courts in matters of this kind, see *Hailsham*, vol. 31 para. 319; *Incorporated Law Society v Vermooten*, 17 S.C. 312; *Incorporated Law Society v Badenhorst*, 19 S.C. 73; *Incorporated Law Society v Scholtz*, 19 S.C. 439; *Ex parte de Klerck*, 20 S.C. 161; *Ex parte Krause*, 1905 T.S. 221 at pp. 227, 231; *Incorporated*

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Law Society v de Villiers, 1915 OPD 98; *Incorporated Law Society v Roos and Others*, 1915 OPD 112; *Incorporated Law Society v Vrolik*, 1918 T.P.D. 366.

W. Pollak, Q.C. (with him *B. L. S. Franklin)*, for the respondent: The present proceedings are not for the purpose of punishment, but to prevent unworthy practitioners from practising before the Courts. The misconduct must affect the standing and character of the attorney, but there is nothing in the conduct of the respondent which renders him unfit to be an attorney. The mere fact of a conviction is not sufficient. The Court must consider the nature and circumstances of the conviction and then determine whether the attorney concerned is a fit and proper person to remain an attorney, *Vrolik's* case, *supra; Incorporated Law Society v Levin*, 1927 T.P.D. 996 at p. 998; *Merry v Natal Society of Accountants*, 1937 AD 331 at p. 335. The conduct complained of must be dishonourable. The question of admission and striking-off are governed by the same principles. If the conviction does not reflect on the personal character, there should not be a striking-off, *Ex parte Krause*, 1905 O.R.C. 82; *Weare's* case, 1893 (2) Q.B. 439; *Wallis'* case, 1866 L.R. 1 P.C. A.C. 283. Motive is important, *Ex parte Krause*, 1905 T.S. at pp. 225, 231, 233. The Court takes a less serious view when the offence is not connected with his profession, *Hill's* case, 1868 (3) Q.B. 543 at p. 548; *Ex parte Stanley*, 1902 T.S. 105; *Incorporated Law Society v Luyt*, 1915 CPD 763. The cases in which attorneys found guilty of High Treason were suspended or struck off the roll are distinguishable. The grounds on which such action was taken was in each case the fact that the attorney concerned had violated his solemn oath of allegiance. The respondent has done nothing to bring his conduct within the scope of these cases. As to costs, an order directing respondent to pay the applicant's costs would itself be a form of disciplinary action taken by the Court, *Luyt's* case, *supra*. Respondent has done nothing to warrant any disciplinary action. It is submitted that no order should be made as to costs.

Cur. adv. vult.

Postea (April 28th).

Judgment

RAMSBOTTOM, J.: The respondent is an attorney duly admitted to practice in the Transvaal. On December 2nd 1953 he was convicted of contravening sec. 11 *(b)* of Act 44 of 1950. He was sentenced to imprisonment with hard labour for nine months and the

sentence was suspended for two years on condition that during that period he is not found guilty of a contravention of the said action. The Incorporated Law Society has now applied for an order removing the name of the respondent from the roll of attorneys of this Court. The petition is based on two grounds: First, that the respondent committed acts which constituted a contravention of sec. 11 *(b)* of Act 44 of 1950 as a result of which he was indicted and convicted; second, that at a meeting held on May 25th 1952 he uttered words with the intent to promote a feeling of hostility between Natives and Europeans and thus committed a contravention

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of sec. 29 (1) of Act 38 of 1927. The respondent has not been prosecuted on a charge of committing the latter offence, and he denies that he uttered any words with the intent alleged. The applicant has abandoned the second ground and we are concerned only with the contravention of Act 44 of 1950.

The fact that an attorney has been convicted of a crime is *prima facie* evidence of misconduct. But there are many offences the commission of which by an attorney calls for no disciplinary action of the kind we are now asked to take - see *In re Weare* L.R. 1893 (2) Q.B. 439 *per* LOPES, L.J. at p. 450. For the decision of this application it is necessary to understand both what the offence was that the respondent committed and what he did in committing it.

The offence of which the respondent was convicted was that of contravening sec. 11 *(b)* of Act 44 of 1950, the Suppression of Communism Act. Sec. 11 *(b)* provides that

> 'any person who advocates, advises, defends or encourages the achievement of any such object (i.e. one of the objects of communism) or any act or omission which is calculated to further the achievement of any such object' shall be guilty of an offence.

The Act does not contain a definition of 'the objects of communism', but it contains a definition of 'communism' which includes among other things - sec. 1 (1) (ii) *(b)* -

> 'any doctrine or scheme which aims at bringing about any political, industrial, social or economic change within the Union by the promotion of disturbance or disorder, by unlawful acts or by omissions or by the threat of such acts or omissions or by means which include the promotion of disturbance or disorder, or such acts or omissions or threat.'

The indictment on which the respondent was tried alleged that he and a number of other persons contravened sec. 11 *(b)* of Act 44 of 1950 by encouraging and advising a scheme which aimed at bringing about political, industrial, social, or economic changes in the Union by unlawful acts or omissions or by the threat of such unlawful acts. The changes which the respondent was alleged to have aimed at bringing about are *inter alia* the abolition of laws differentiating between Europeans and non-Europeans; the extension of full rights of franchise to the non-European population on the same basis as those possessed by

Europeans, and the granting to them of direct representation in Parliament, Provincial, and Municipal Councils; the abolition of certain laws including the pass laws. The indictment alleged that the scheme which the respondent encouraged aimed at bringing about the said changes by unlawful acts or omissions namely by the contraventions by Natives, or Asiatics or Coloured persons of laws relating to the carrying of passes and permits by Natives; the entering of Native locations under the control of Municipalities without permits; the limitation of stock in Native areas, and other specified laws.

What is forbidden by sec. 11 *(b)* read with sec. 1 (1) (ii) *(b)* of the Act (so far as is material) is to advocate or advise or defend or encourage any scheme which aims at bringing about any political, industrial, social, or economic change within the Union by unlawful acts or omissions. What was alleged was that the respondent advocated or encouraged a scheme whereby the repeal of certain laws was to be brought about by the unlawful acts of deliberately disobeying certain specified laws.

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It may be mentioned in passing that the respondent was not alleged to have committed any act calculated to assist in the propagation of communism or communist doctrine as generally understood; he was charged with encouraging a scheme which aimed at bringing about certain social and political changes such as the repeal of the pass laws, the laws which enforce the segregation of the races, and the laws which restrict non-European franchise, by the unlawful means of disobedience to certain laws. That is the offence of which he was convicted.

The evidence that was placed before us as to what the respondent did in committing the offence is as follows: In July 1951 a joint conference was held of the National Executives of the African National Congress, the South African Indian Congress, and representatives of the Franchise Action Council (Cape). The conference resolved: -

'(1) To declare war on Pass Laws and Stock Limitation, the Group Areas Act, and the Voters' Representation Act, the Suppression of Communism Act, and the Bantu Authorities Act.

(2) to embark upon an immediate mass campaign for the repeal of these oppressive laws.

(3) to establish a Joint Planning Council to co-ordinate the efforts of the National Organisations of the African, Indian and Coloured peoples in this mass campaign.'

A Planning Council was appointed in November 1951 and this Council issued a report and recommended a 'plan of action' by which the resolutions of the conference should be carried into effect. The Planning Council recommended that

'the forms of struggle for obtaining the repeal of unjust laws which should be considered are *(a)* defiance of unjust laws and *(b)* industrial action'.

The Council expressed opinion that 'lawful industrial action' should not be resorted to until a later stage, and confined its recommendations to a plan for the 'defiance of unjust laws'. The purpose of the plan and the plan of action recommended are set out in the following extracts from the report: -

7. In dealing with the two forms of struggle mentioned in paragraph six, we feel it necessary to reiterate the following fundamental principle which is the kernel of our struggle for freedom.

We believe that without its realisation race hatred and bitterness cannot be eliminated and the overwhelming majority of the people cannot find a firm foundation for progress and happiness.

It is to be noted, however, that the present campaign of defiance of unjust laws is only directed for the purposes of securing the repeal of those unjust laws mentioned in the resolution of the Joint Conference.

> All people irrespective of the National groups they may belong to, and irrespective of the colour of their skin, who have made South Africa their home, and who believe in the principles of democracy and the equality of man are South Africans. All South Africans are entitled to live a full and free life on the basis of the fullest equality. Full democratic rights with a direct say in the affairs of the Government are the inalienable right of every South African - a right which must be realised in the lifetime of the present generation if South Africa is to be saved from social chaos and tyranny and from the evils arising out of the existing denial of franchise to vast masses of the population on the grounds of race and colour. The struggle which the National organisations of the non-European people are conducting is not directed against any race or National group. It is against the unjust laws which keep in perpetual subjection and misery vast sections of the population. It is for the transformation of conditions which will restore human dignity, equality and freedom to every South African.

8. Plan of Action. We recommend that the form of struggle for securing the repeal of unjust laws (should be) by *Defiance of Unjust Laws based on Non-co-operation.* Defiance of unjust laws should take the form of committing breaches of certain selected laws and regulations which are undemocratic

unjust, racially discriminatory and repugnant to the natural rights of man. Rather than submit to the unjust laws we should defy them deliberately and in an organised manner and be prepared to bear the penalties thereof.

The struggle of the Defiance of Unjust Laws should be planned into three stages - although

the timing would to a large extent depend on the progress, development and the outcome of the previous stage.

Three stages of Defiance of Unjust Laws: -

(*a*) *First Stage.* Commencement of the struggle by calling upon selected and trained persons to go into action in the big centres, e.g. Johannesburg, Cape Town, Bloemfontein, Port Elizabeth and Durban.

(*b*) *Second Stage.* Number of volunteer corps to be increased as well as the number of centres of operation.

(*c*) *Third Stage.* This is the stage of mass action during which as far as possible, the struggle should broaden out on a country-wide scale and assume a general mass character. For its success preparation on a mass scale to cover the people both in the urban and rural areas would be necessary.

11. *Laws to be tackled.* In recommending laws and regulations which should be tackled we have borne in mind the laws which are most obnoxious and which are capable of being defied.

The African National Congress. Insofar as the African National Congress is concerned, the law which stands out for attack is naturally the Pass Laws. *Method of Struggle on the Pass laws*:

(*a*) A Unit of Volunteer Corps should be called upon to defy a certain aspect of the pass law, e.g. enter a location without a permit. The Unit chosen goes into action on the appointed day, enters the location and holds a meeting. If confronted by the authorities, the leader and all the members of the Unit court arrest and bear the penalty of imprisonment.

(*b*) Selected leaders to declare that they will not carry any form of passes including the Exemption Pass and thus be prepared to bear the penalty of the law.

(*c*) Other forms of struggle on the Pass Laws can also be undertaken depending on the conditions in the different areas throughout the country.

It is not suggested that the respondent was a member of the Planning Council, but it is alleged that he was present at a conference of the African National Congress on December 15th, 1951, when the report was presented and was adopted, and that thereafter he took an active part in giving effect to the recommendations. On May 25th, 1952, the respondent addressed a meeting at which about 500 Natives and a few Coloured people were present. Notes were taken of his speech and it appears that in the course thereof he made the following remarks which are material to this application:

'Next Saturday an historical meeting will be held . . . it will be published all over the world. It will be held in Port Elizabeth by the African National Congress and the South African Indian Congress and this meeting will

decide on the date when the forces of liberation will go into action, and this meeting will also consider the notices which were served on our National leaders . . . In spite of our unity and support of the world, Dr. Malan has made laws. It is time you will raise your hands and say, 'This will happen over our dead bodies . . .' When our leaders are arrested our national body cannot be banned, for the Government will have to ban every individual. I must warn you that we have a government in power that does not consider public opinion . . . Those of you who are called upon to defy the unjust laws must bear in mind that you must do this in a peaceful manner - the greatest discipline is required from you . . . We shall not rest until all the gaols are filled . . . You know of our decisions to campaign against the unjust laws and pass laws . . . the decision taken by the A.N.C. We are all united in this cause. The S.A.I.C. are supporting the decision of the A.N.C. . . . You must decide whether you belong to the side of Dr. Moroka, the side of freedom, or Dr. Malan, the side of oppression . . . You must demonstrate that you stand full square behind your leaders. We want Dr. Dadoo, Dr. Moroka, Kontane, J. B. Marks, Bopane.'

The passages from the speech which I have omitted contain criticism

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of the Government and of individual Ministers which do not, of themselves, constitute an offence.

There can be no doubt that in his speech on May 25th, 1952, the respondent advocated and encouraged the scheme which had been proposed by the Planning Council and that the scheme aimed at bringing about social and political changes in the Union by unlawful acts or omissions namely by disobedience to laws. The respondent has not denied his participation in the scheme.

It was contended on behalf of the applicant that the respondent's contravention of Act 44 of 1950 was made with full knowledge of what Parliament had forbidden, and was deliberate, that respect for the law was required from an attorney, and that by his deliberate disobedience to a command of the law-giver the respondent has shown himself to be unfit to be allowed to practise as an attorney of this Court.

While I think that in certain circumstances an attorney who is privileged to practise in the Courts may be expected to observe the laws more strictly than other persons, the fact that an attorney has deliberately disobeyed the law does not necessarily disqualify him from practising his profession or justify the Court in removing his name from the roll. We are not concerned in this case with misconduct committed by an attorney in his professional capacity; the offence committed by the respondent had nothing to do with his practice as an attorney. It is clear, however, that the Court will in a proper case remove an attorney from the roll where he has been convicted of a crime which was not committed in his professional capacity: *Re Hill*, L.R. (1868) 3 Q.B. 543 and *In re Weare*, L.R. 1893 (2) Q.B. 439.

The principle to be applied was stated in *Ex parte Krause*, 1905 T.S. 221, in the following passage in the judgment of INNES, C.J., (at p. 223):

'Before I deal with the facts I should like to make it clear what to my mind is the ground upon which the Court

refuses to place upon the roll of its practitioners persons against whose names criminal convictions stand. It is not because a criminal conviction *ipso facto* disqualifies a man from admission to the ranks of the Bar or the Side-Bar. I need not refer to what may have happened in other parts of South Africa, but we know that in this Court there are men enrolled in the ranks of the Bar and the Side-Bar, leading members of the profession, worthily occupying the position, against whom criminal convictions do stand. No attempt was made to remove their names, nor was objection taken to their being enrolled anew when the roll of this Court was made up; because those convictions reflected in no way upon the personal honour of the men against whom they stood. Therefore, it is not the bare fact of conviction that disqualifies; nor is it a desire on the part of the Court again to mark its sense of the enormity of the crime. That has been expiated by punishment as far as its actual commission is concerned. The real reason is this - that in most cases the fact of the criminal conviction shows the man to be of such a character that he is not worthy to be admitted to the ranks of an honourable profession. That is the real ground upon which the Court acts in such cases; and it is from that standpoint in my opinion that we should regard the facts of this case.'

That statement was concurred in by SOLOMON, J., and MASON, J.

Ex parte Krause was an application for the admission of an advocate, but the same principle is applied when an application is made for the removal of a practitioner from the roll. See *Re Hill, supra.*

The principle stated by INNES, C.J., is the principle applied by the English Courts. Thus, in *Re Hill, supra*, COCKBURN, C.J., said:

'When an attorney does that which involves dishonesty, it is in the interest of the suitors that the Court should interpose and prevent a man guilty of such misconduct from acting as an attorney of the Court,'

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and BLACKBURN, J., said:

'We are to see that the officers of the Court are proper persons to be trusted by the Court with regard to the interest of suitors, and we are to look to the character and position of the persons, and judge of the acts committed by them upon the same principle as if we were considering whether or not a person is fit to become an attorney . . . The principle on which the Court acts being to see that the suitors are not exposed to improper officers of the Court.'

In *In re Weare, supra*, LORD ESHER, M.R., said:

'The Court is not bound to strike him (a solicitor) off the rolls unless it considers that the criminal offence of which he has been convicted is of such a personally disgraceful character that he ought not to remain a member of that strictly honourable profession.'

It must be understood that in striking off the roll or in suspending an attorney who has been convicted of a crime the Court is not punishing him for his offence; for that he has already been sentenced. That was stated as long ago as 1778 by LORD MANSFIELD in *Re Brownsall*, 2 Cowp. 829 (quoted in *Re Weare, supra)*, and it is made clear in the passage from the judgment of INNES, C.J., in *Ex parte Krause* that I have quoted.

The sole question that the Court has to decide is whether the facts which have been put

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before us and on which the respondent was convicted show him to be of such character that he is not worthy to remain in the ranks of an honourable profession. To that question there can, in my opinion, be only one answer. Nothing has been put before us which suggests in the slightest degree that the respondent has been guilty of conduct of a dishonest, disgraceful, or dishonourable kind; nothing that he has done reflects upon his character or shows him to be unworthy to remain in the ranks of an honourable profession. In advocating the plan of action, the respondent was obviously motivated by a desire to serve his fellow non-Europeans. The intention was to bring about the repeal of certain laws which the respondent regarded as unjust. The method of producing that result which the respondent advocated is an unlawful one, and by advocating that method the respondent contravened the statute; for that offence he has been punished. But his offence was not of a 'personally disgraceful character', and there is nothing in his conduct which, in my judgment, renders him unfit to be an attorney.

Mr. *O'Hagan* contended that the test of whether the Court should take disciplinary action against the respondent is whether the conduct is 'a matter of indifference to the Court'. As the authorities I have quoted show, that is not the test. The respondent's conduct is not a matter of indifference to the Court; he has been tried, convicted, and punished. He must not be punished again by being struck off the roll or suspended. That action will only be taken if what he has done shows that he is unworthy to remain in the ranks of an honourable profession.

It must not be thought that I do not regard the offence for which the respondent has been convicted as a serious one; defiance of the law may have grave consequences. But to protect the State, Parliament has decreed that what the respondent has done is unlawful and it has prescribed the penalty. The respondent has received his punishment, and it is not the function of the Court in proceedings of this kind to punish him again.

Mr. *O'Hagan* drew our attention to several cases in which attorneys

who had been found guilty of High Treason had been suspended or struck off the roll. In my opinion those cases have no bearing on the present case. Every attorney in the Union must take an oath of allegiance when he is admitted to practice. It is an implied condition of his right to continue in practice that he shall continue to give true allegiance. If he repudiates his allegiance he breaches a condition of his right to practice. In addition, the violation of an oath, solemnly taken, by an attorney undoubtedly reflects upon his fitness to remain in the profession. Finally, treason involves treachery, and treachery is commonly and rightly regarded as dishonourable. None of those features is present in the case before us, and nothing that the respondent has done brings him within the scope of those cases.

Mr. *O'Hagan* argued that, as the respondent has not expressed regret for what he has done,

the Court ought to take disciplinary action. I cannot accept that argument. If what the respondent has done does not warrant the exercise by the Court of its disciplinary powers, he cannot be required to express regret; if what he did was not dishonourable his failure to express regret cannot make it so.

Finally, Mr. *O'Hagan* contended that the Court should 'mark its disapproval' by ordering the respondent to pay the costs of the application. This contention proceeds, again, upon the incorrect assumption that it is the Court's function to punish an attorney who has been convicted of an offence. In my opinion the application is without foundation and the respondent cannot be ordered to pay the costs.

The application is dismissed. There will be no order as to costs.

ROPER, J., concurred.

Applicant's Attorney: *P. C. Metelerkamp.* Respondent's Attorneys: *Burg & Bresler.*