RICE AND ANOTHER v SOCIETY OF ADVOCATES OF SOUTH AFRICA (WITWATERSRAND DIVISION) 2004 (5) SA 537 (W)

Citation	2004 (5) SA 537 (W)
Case No	03/24201
Court	Witwatersrand Local Division
Judge	Ngoepe JP, Snyders J and Ponnan J
Heard	October 16, 2003
Judgment	April 1, 2004
Counsel	G Bizos SC (with him P G Malindi) for the applicants. H S Epstein SC (with him T Motau) for the respondent. W H G van der Linde SC for the General Council of the Bar of South Africa.
Annotations	❑

Flynote : Sleutelwoorde

Advocate - Reinstatement of - Requirements in terms of Reinstatement of Enrolment of Certain Deceased Legal Practitioners Act 32 of 2002 discussed - Act recognising appropriateness of honouring memory of those legal practitioners who were struck off roll on account of their opposition to previous political dispensation of apartheid or their assistance to persons who were so opposed - Act seeking to redress injustices of past by restoring posthumously, to disbarred legal practitioners, their previous legal status - Conduct leading to deceased's name being removed from roll having to be related *directly* to deceased's opposition to previous political order.

Headnote : Kopnota

The late Abram Fischer's name was removed from the roll of advocates in 1965 following his failure to appear before Court after his release on bail. The present application, brought by his daughters, was for his posthumous

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reinstatement on the roll of advocates in terms of the provisions of the Reinstatement of Enrolment of Certain Deceased Legal Practitioners Act 32 of 2002.

Held, that the preamble to the Act recognised that it was appropriated to honour the memory of those legal practitioners who were struck off the roll on account of their opposition to the previous political dispensation of apartheid or their assistance to persons who were so opposed. The Act sought to redress the injustices of the past by restoring posthumously, to disbarred legal practitioners, their previous professional status. (Paragraph [2] at 539B/C - C/D.)

Held, further, that it was clear that not every name of a deceased person would be re-enrolled. The application had to meet certain requirements, *inter alia (a)* the person whose name was sought to be reinstated had to be deceased; *(b)* the conduct that led to the deceased's name being removed from the roll had to have been related *directly* to the

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deceased's opposition to the previous political order. (Paragraph [4] at 539I - 540A/B.)

Held, further, after evaluating the evidence placed before Court, that the application met the requirements of the Act. The applicants, being the daughters of the deceased, had an interest in the matter. It was clear from the evidence that Abram Fischer's conduct that had resulted in his name being removed from the roll of advocates was related directly to his opposition to the policy of apartheid; his conduct was aimed at bringing about a democratic, political or constitutional change in the country, as also to assisting the oppressed. (Paragraph [18] at 544D/E - F.)

Held, accordingly, that an order had been granted for the reinstatement of Abram Fischer's name on the roll of advocates. (Paragraph [19] at 544I - 545A.)

Cases Considered

Annotations

Reported cases

Society of Advocates of SA (Witwatersrand Division) v Fischer 1966 (1) SA 133 (T): referred to.

Statutes Considered

Statutes

The Reinstatement of Enrolment of Certain Deceased Legal Practitioners Act 32 of 2002: see *Juta's Statutes of South Africa 2002* vol 5 at 3-145.

Case Information

Application for the reinstatement of Abram Fischer on the roll of advocates. The facts and issues appear from the reasons for judgment.

G Bizos SC (with him *P G Malindi*) for the applicants.

H S Epstein SC (with him *T Motau*) for the respondent.

W H G van der Linde SC for the General Council of the Bar of South Africa.

Cur adv vult.

Postea (April 1).

Judgment

Ngoepe JP, Snyders J *et* Ponnan J:

[1] In 1965 the Society of Advocates of South Africa (Witwatersrand) successfully applied for the removal of the name of the late Abram

NGOEPE JP SNYDERS J ET PONNAN J

Fischer from the roll of advocates. 1(1) That application followed his failure to appear before court after his release on bail in a case, details of which will emerge later. The present application, at the instance of his daughters, is for his posthumous reinstatement on the roll of advocates, in terms of the provisions of the Reinstatement of Enrolment of Certain Deceased Legal Practitioners Act 2(2) (the Act). On 16 October 2003 we granted the application and said then that our reasons would follow.

[2] The preamble to the Act recognises that it is appropriate to honour the memory of those legal practitioners who were struck off the roll on account of their opposition to the previous political dispensation of apartheid or their assistance to persons who were so opposed. The Act seeks to redress the injustices of the past by restoring posthumously, to disbarred legal practitioners, their previous professional status. This application is significant in that, apart from involving the name of one of the greatest legal giants and visionaries this country has known, it is the first one to be brought in terms of the Act.

[3] In the fourth Bram Fischer Memorial Lecture, 3(3) Justice Moseneke, apparently with reference to a Bill then under consideration, had this to say:

> 'With the benefit of the passage of time, abatement of political obsession of yesteryear and in recognition of his moral fortitude, it would not be untoward to move for the posthumous re-admission of Bram Fischer to the Bar. A special statutory provision should readily overcome the technical or jurisdictional impediments, which may be posed by the Admission of Advocates Act.'

On 6 November 2002 the Act was assented to by the President. Section 1 thereof provides:

> 'Despite the provisions of the Admission of Advocates Act 74 of 1964 and the Attorneys Act 53 of 1979, the name of any deceased person who was removed from the roll of advocates or attorneys prior to 27 April 1994, may, upon application brought by a member of such deceased person's family or, after consultation with the deceased person's family, by -
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> *(a)* the General Council of the Bar of South Africa;
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> *(b)* the Bar Council concerned;
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> *(c)* the Society of Advocates concerned;
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> *(d)* the Law Society of South Africa;
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> *(e)* the law society concerned; or
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> *(f)* any other interested person,
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> to any High Court, be reinstated to the roll of advocates or attorneys, as the case may be, if the Court is satisfied that the conduct that led to that person's name being removed from the roll in question was directly related to that person's opposition to the previous political dispensation of apartheid and to bringing about political or constitutional change in the Republic, or to assisting persons who were likewise opposed to the said apartheid dispensation.'

[4] It is clear that not every name of a deceased person will be re-enrolled. The application must meet certain requirements, *inter alia*:

(a) the person whose name is sought to be reinstated must be deceased;

(b) secondly, the conduct that led to the deceased's name being removed from the roll must have been *directly* related to the deceased's opposition to the previous political order. Where the conduct is tenuously or indirectly related to the political objective referred to, such application may encounter some difficulties. Clearly, the Legislature could not have, in our view, intended to open the floodgates. Naturally, each case will depend on its own facts.

[5] As far as the first requirement is concerned, we accepted the applicants' affidavit that Abram Fischer was deceased. Given the facts of the case, there was no need to require the production of a copy of the death certificate. As far as the second requirement is concerned, the Court had to look into Abram Fischer's conduct that led to his being struck off the roll of advocates. The answer lies substantially in two letters written by him to Advocate *Harold Hanson SC* who was then defending him in his criminal trial.

[6] The first is a letter dated 22 January 1965, relevant portions of which read:

'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. In brief, the reasons which have compelled me to take this step and which I wish to communicate to the Court are the following. 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.' 4(4)

[7] In the second letter, dated 4 February 1965, he stated, *inter alia*:

'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 today. 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.' 5(5)

[8] It is necessary to place the two letters in context. On 24 September 1964 Abram Fischer appeared, together with thirteen others, before the regional court on charges of contravening Act 44 of 1950. The conduct complained of, related to his membership of the South African Communist Party as well as acts calculated to further the achievement of the objects of communism.

[9] Abram Fischer applied for bail. At that time he was briefed to appear before the Privy Council in England. In his application for bail a number of colleagues and attorneys testified to his integrity. In admitting him to bail the presiding magistrate remarked that Abram Fischer 'was a son of our soil, an advocate of standing in this country'. He attended the hearing before the Privy Council and returned to South Africa to attend his own trial which commenced on 16 November 1964.

[10] On 25 January 1965, Abram Fischer did not attend his trial. The first letter is an endeavour by him to explain why he could not continue to appear as an accused person before the regional court. A mere two days thereafter, the Johannesburg Bar Council resolved to instruct their attorneys to bring an application for the removal of his name from the roll of advocates. The motivation therefor was his having absented

himself from his trial; behaviour which, allegedly, was not becoming a member of the Society.

[11] When Abram Fischer became aware through reports in the media of the proposed application by the Johannesburg Bar Council for his striking off, he wrote the second letter.

Of the sentiments expressed by Abram Fischer in those letters as well as his address to Court after his recapture, the late Chief Justice I Mahomed was to say the following years later:

'What these statements amount to is this: there must be a rational and purposive relationship between law and morality and particularly between law and justice. The law must have a morally defensible content. It is that which compels my fidelity to it. Your laws do not have that content. They are immoral. I am therefore not obliged to obey them. Indeed I am entitled to defy them with the object of causing other laws to be enacted which are ethically purposive and which can therefore properly compel my fidelity.' 6(6)

[12] Faced with those complex and challenging legal, jurisprudential and philosophic issues; the Court that considered the application for Abram Fischer's removal concluded that

> '. . . 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: . . . 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 this 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'. 7(7)

The Court was not persuaded by the argument of Abram Fischer's counsel that 'his 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'. The Court held that it is the duty of an advocate 'to further the administration of justice in accordance with the laws of the country and not to frustrate it'. 8(8)

[13] Almost ten months after his bail was estreated, Abram Fischer was captured and put on trial. Addressing Court during his trial, he is reported as having said the following:

> 'My Lord when a man is on trial for his political beliefs and actions, two courses are open to him. He can either confess to his transgressions and plead for mercy, or he can justify his beliefs and explain why he has acted as he did. Were I to ask for forgiveness today, I would betray my cause. That course, my Lord, is not open to me. I believe that what I did was right, and I must therefore explain

> to your Lordship what my motives were; why I hold the beliefs that I do, and why I was compelled to act in accordance with them. . . .
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> I accept, my Lord, the general rule that for the protection of any society laws should be obeyed. But when the laws themselves become immoral, and require the citizen to take part in an organised system of oppression - if only by his silence and apathy - then I believe that a higher duty arises. This compels one to refuse to recognise such laws.' 9(9)

He went on to say:

> 'All the conduct . . . with which I have been charged, has been directed towards maintaining contact and understanding between the races of this country. If one day it may help to establish a bridge across which white leaders and the real leaders of the non-whites can meet to settle the destinies of all of us by negotiation, and not by force of arms, I will be able to bear with fortitude any sentence which this Court may impose on me.' 10(10)

[14] Almost 30 years later Abram Fischer's prophetic words came to fruition in the negotiated settlement which culminated in a constitutional change in this country. The stated purpose of the Constitution as declared in express terms in its preamble is to lay the 'foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law'. The founding values of a new social order are articulated in the Bill of Rights of the Constitution, which as the cornerstone of our democracy enshrines the 'rights of all people in our country and affirms the democratic values of human dignity, equality and freedom'. The Constitution seeks to transform our society from an oppressive, securocratic State to an open and democratic

society based on human dignity, equality and freedom. There is no doubt that this was what Abram Fischer was fighting for.

[15] On 18 July 1995 the Johannesburg Bar Council, recognising the dilemma which had confronted Abram Fischer, adopted a resolution, in the following terms:

> 'While recognising that opinions may differ, the present Johannesburg Bar Council has resolved that it does not hold the view that Bram Fischer was not a fit and proper person to continue to practise as an advocate. It believes that a grave injustice was done to him and today it can only apologize to his family. The judgment is not one which it would wish to retain. Moreover, were it possible, the Johannesburg Bar Council would support any application for his readmission to the roll of advocates.'

[16] During October 1997 the General Council of the Bar acknowledged, in its submissions to the Truth and Reconciliation Commission, not just the integrity of Abram Fischer but also the fundamental role that he played in the achievement of a fair and just dispensation in South Africa.

Mr *Epstein* who represented the Johannesburg Bar before us submitted:

> 'Ironically, it was the integrity of Bram Fischer and the fact that he was a most

> honourable and trustworthy member of the Bar which led to his being struck off the roll of advocates.'

[17] Indeed Adv Festenstein, who was the deponent to the founding affidavit on behalf of the Society of Advocates in support of the application for the striking off of Abram Fischer had stated:

> 'To the best of my knowledge and belief the respondent has at all times since he commenced legal practice until 25 January 1965, been regarded by the courts of the Republic, by the members of the Johannesburg Bar and by other legal practitioners as a most honourable and trustworthy member of the Bar, and has at all times observed the highest ethical standards of legal practice and has been in every respect a worthy and distinguished member of the legal profession.' 11(11)

In describing the decision to be given by it on the application for his striking off as 'an unpleasant duty', the Court appeared to be acutely aware of the integrity of Abram Fischer and the moral dilemma which he faced. For isn't the attainment of justice a human excellence? Abram Fischer recognised, as did Plato, that 'temperance and justice are beautiful but hard and troublesome, whilst their opposite are pleasant and easy of attainment'. 12(12)

[18] In the light of all the aforegoing, we were satisfied that the application meets the requirements prescribed by the Act. The applicants, being the daughters of the deceased, have an interest in the matter. It is clear from his letters referred to above that Abram Fischer's conduct that resulted in his name being removed from the roll of advocates was directly related to his opposition to the policy of apartheid; his conduct was aimed at bringing about a democratic, political or constitutional change in the country, as also to assisting the oppressed. It is not without significance that the Court in the application for Abram Fischer's striking off noted that insofar as a future application for his readmission was concerned, it was impossible for that Court to foresee what would happen and that the Court was concerned with the laws then in force and with the structure of society as it then existed in

this country.

[19] The application for Abram Fischer's removal was heard by a Full Bench of this Division. It was, in our view, therefore appropriate that the application for his reinstatement also served before a Full Bench; but even more appropriately, before a Court as representative of the diversity of our society as possible. This is the kind of society that Fischer fought for. The future time to which reference is made in the judgment for his striking off has now arrived. The Society of Advocates recognises that Mr Fischer was a fit and proper person to continue to practise as an advocate. Mr *Epstein*, supported by Mr *Van der Linde* on behalf of the General Council of the Bar of South Africa, submitted that a grave injustice was done to Abram Fischer. It fell to this Court to rectify that injustice.

In the result and for the reasons stated, it took little urging from Mr *Bizos*, on behalf of the applicants, to persuade us to grant the order we

made on 16 October 2003 for the reinstatement of Abram Fischer's name on the roll of advocates.

Applicant's Attorneys: *Legal Resources Centre*.

2004 (5) SA p545

Endnotes

1 (Popup - Popup)

Society of Advocates of SA (Witwatersrand Division) v Fischer 1966 (1) SA 133 (T).

2 (Popup - Popup)

Act 32 of 2002.

3 (Popup - Popup)

2002 *SAJHR* 309.

4 (Popup - Popup)

Society of Advocates of SA (Witwatersrand Division) v Fischer (*supra*) at 135C - E.

5 (Popup - Popup)

Society of Advocates of SA (Witwatersrand Division) v Fischer (*supra*) at 135F - 136B.

6 (Popup - Popup)

The second Bram Fischer Memorial Lecture (1998 *SAJHR* 209) delivered by Chief Justice I Mahomed at the House of Assembly, Cape Town, 3 February 1998.

7 (Popup - Popup)

Society of Advocates of SA v Fischer (*supra*) at 137A - D.

8 (Popup - Popup)

Society of Advocates of SA v Fischer (*supra*) at 137F.

9 (Popup - Popup)

The Bram Fischer Memorial Lecture (1998) *SAJHR* 209 at 211.

10 (Popup - Popup)

The third Bram Fischer Memorial Lecture (2000) *SAJHR* 193 at 194.

11 (Popup - Popup)

SALJ vol 115 (1998) pp 67 - 86.

12 (Popup - Popup)

Plato *The Republic*.