



SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal
DATE 10 July 2018
STATUS Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Jiba & another v The General Council of the Bar of South Africa and Mrwebi v The General Council of the Bar of South Africa (141/17 and 180/17) [2018] ZASCA 103 (10 July 2018)

Today the Supreme Court of Appeal (SCA) will hand down judgment in which it upholds an appeal against the order of the Gauteng Local Division of the High Court, Pretoria (the High Court) and dismisses the counter-appeal, brought by the General Council of the Bar (GCB), with costs. The appeal concerns the order of the High Court in which it struck from the roll of advocates the names of Ms Nomgcobo Jiba (Jiba), Mr Lawrence Sithembiso Mrwebi (Mrwebi). The application to strike from the roll of advocates Mr Sibongile Mzinyathi (Mzinyathi) was dismissed, by the High Court, with costs, it is against the order of costs in which the GCB filed a counter-appeal.

The GCB sought to prove that Jiba and Mrwebi were not fit and proper persons to remain admitted as advocates. The guidelines to be considered by a court before an advocate can be struck from the roll were stated in *Jasat v Natal Law Society* 2000 (3) SA 44; (2000) 2 All SA 310 (SCA). In *Jasat* it was held that a court must: firstly, decide whether the alleged offending conduct has been established; secondly, consider whether the person concerned, in the discretion of the court, is not a fit and proper person to continue to practise. Thirdly, inquire whether in all the circumstances the person in question is to be removed from the roll or whether an order of suspension from practice would suffice.

The complaints against Jiba related to the *Boyseen's* case and her handling of the spy tapes case. However, the main reason, in the High Court's view, why Jiba was not fit and proper to remain on the roll of advocates was her handling of the Mdluli case. Shongwe ADP, the majority judgment, considered the complaint against Jiba together with Jiba's answers and explanation in the context of her position as acting NDPP and the fact that Jiba was cited as a litigant. The majority judgment found no misconduct, on the part of Jiba, was established by the GCB.

The complaints against Mrwebi were that he sought to mislead the court as to the extent of the consultation or 'in consultation' between himself and Mzinyathi. In that Mrwebi took the decision to withdraw the fraud and corruption charges against Mdluli before he consulted with Mzinyathi in terms of s 24(3) of the NPA Act and for this reason he was not a fit and proper person. Mrwebi provided contradictory explanations of when and why he decided to withdraw the charges against Mdluli. The majority judgment found that, in respect of Mrwebi, the GCB established the alleged offending conduct. However due to the fact that there was no personal gain from Mrwebi's conduct and the fact that the purpose of such proceedings are to uphold the rules regulating the profession and not to punish the wrongdoer the sanction handed down by the High Court was not justified. The majority judgment further held that the High Court materially misdirected itself in striking Mrwebi from the roll, it failed to consider why suspension was not an appropriate sanction. The majority judgment held that the appropriate sanction is for Mrwebi to be suspended as an advocate for a period of 6 months from the date of 15 September 2016.

The counter-appeal against the order of costs arose from the complaint against Mzinyathi. The complaint was in respect of certain negative remarks made against Mzinyathi by Murphy J in that Mzinyathi's confirmatory affidavit differed from the evidence he tendered at the disciplinary hearing of Breytenbach. For this reason the GCB interpreted this contradiction as misconduct and therefore Mzinyathi was not a fit and proper person. The High Court dismissed the complaint against Mzinyathi with costs. The GCB appealed the costs order. The majority judgment could find no reason showing that the High Court did not exercise its discretion honestly and judiciously and for this reason it could not interfere with the findings of the High Court. Even though the GCB acted as *custos morum* such cannot protect it from a costs order especially when the GCB should have at least withdrawn the application to strike Mzinyathi's name from the roll of advocates. The Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. The counter-appeal was dismissed on these grounds.

In a dissenting judgment written by Van der Merwe JA with Leach JA concurring. Van der Merwe JA would have found that the appeals of Jiba, Mrwebi should fail and the cross appeal of the GCB should succeed.