
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE COURT OF APPEAL (WA)

CITATION : KHOSA -v- LEGAL PROFESSION COMPLAINTS
COMMITTEE [2017] WASCA 192 (S)

CORAM : BUSS P
MURPHY JA
BEECH JA

HEARD : 20 OCTOBER 2017

DELIVERED : 20 OCTOBER 2017

PUBLISHED : 22 NOVEMBER 2017

FILE NO/S : CACV 150 of 2015
CACV 55 of 2016

BETWEEN : MANRAJ SINGH KHOSA
Appellant

AND

LEGAL PROFESSION COMPLAINTS
COMMITTEE
Respondent

ON APPEAL FROM:

Jurisdiction : STATE ADMINISTRATIVE TRIBUNAL OF
WESTERN AUSTRALIA

Coram : JUSTICE J C CURTHOYS (PRESIDENT)
MS R MOORE (MEMBER)
MS A DAVIES (SENIOR SESSIONAL MEMBER)

Citation : LEGAL PROFESSION COMPLAINTS
COMMITTEE and KHOSA [2015] WASAT 107

File No : VR 34 of 2015

Catchwords:

Legal practitioner - Deliberate breach of undertaking given to fellow practitioner
- Penalty - Turns on own facts

Legislation:

Nil

Result:

Penalty of 2 months' suspension imposed

Category: B

Representation:

Counsel:

Appellant : Mr R I Viner QC & Ms R J Lee
Respondent : Mr A J Musikanth

Solicitors:

Appellant : Law on Newcastle
Respondent : Legal Profession Complaints Committee

Case(s) referred to in judgment(s):

Khosa v Legal Profession Complaints Committee [2017] WASCA 192
Legal Profession Complaints Committee and Khosa [2015] WASAT 107
Legal Profession Complaints Committee and Khosa [2015] WASAT 107 (S)

BUSS P

1 **BUSS P:** The appellant, a legal practitioner, appealed to this court against
two decisions of the State Administrative Tribunal (the Tribunal).

2 The first decision was the Tribunal's finding, after a contested
hearing, that the appellant was guilty of professional misconduct in that he
knowingly breached a personal undertaking that he had given to another
practitioner. See *Legal Profession Complaints Committee and Khosa*
[2015] WASAT 107. The second decision comprised, relevantly, the
Tribunal's penalty orders consequent upon its finding of guilt; in
particular, the Tribunal's imposition on the appellant of a 6 month
suspension from legal practice. See *Legal Profession Complaints*
Committee and Khosa [2015] WASAT 107 (S).

3 On 20 October 2017:

- (a) this court unanimously dismissed the appellant's appeal against the
Tribunal's first decision; and
- (b) a majority of this court (Murphy & Beech JJA) allowed the
appellant's appeal against the Tribunal's second decision.

See *Khosa v Legal Profession Complaints Committee* [2017]
WASCA 192.

4 The majority held, relevantly, that the 6 month suspension from legal
practice was manifestly excessive. I dissented.

5 On 20 October 2017, the court published its reasons for decision.
The whole of the court heard submissions from the parties as to the formal
orders that should be made in dismissing the appeal against the Tribunal's
first decision and allowing the appeal against the Tribunal's second
decision and, also, the orders that should be made in relation to costs. The
majority of the court who allowed the appeal against the Tribunal's second
decision heard submissions from the parties as to the new penalty that the
majority should impose.

6 On 20 October 2017, the majority of the court who allowed the
appeal against the Tribunal's second decision imposed a new penalty of
2 months' suspension from legal practice and said they would publish
written reasons later for making that decision.

7 Since I would have dismissed the appeal against the Tribunal's
second decision it is neither necessary nor appropriate for me to make any
observations in relation to the new penalty which the majority imposed.

8 **MURPHY & BEECH JJA:** On 20 October 2017, the court delivered its reasons dismissing the appellant's appeal against the decision of the State Administrative Tribunal (Tribunal) in which the Tribunal had found the appellant guilty of professional misconduct. The court allowed (by a majority) the appellant's appeal in respect of penalty: *Khosa v Legal Profession Complaints Committee*¹ (principal decision).

9 After hearing the parties' further submissions as to penalty on 20 October 2017, we considered that the appellant should be suspended from practice for two months and the court made orders to that effect. We said we would provide written reasons. These are our reasons. They should be read with our reasons in the principal decision.

10 At the hearing on 20 October 2017, senior counsel for the appellant referred to the difficult financial circumstances of the appellant, and emphasised the deleterious financial effects that any suspension would have on the appellant. Senior counsel said that the appellant 'sincerely apologises' for the misconduct and has 'personally been remorseful'. He also said that the appellant comes from a family with a distinguished career in the legal profession and police force. Senior counsel submitted that a fine of \$12,000 would, in all the circumstances, be all that was necessary for the protection of the public and the maintenance of the reputation and standards of the profession. He submitted that a suspension order would involve a 'significant jump in the view of the court of the appropriate sanction'.

11 Counsel for the Committee, also with reference to our earlier reasons, submitted that a suspension order of three months would be appropriate. Neither party adduced further evidence on the question of penalty.

12 It is convenient to set out again the matters to which we had particular regard in the principal decision in concluding that the Tribunal's suspension of six months was manifestly excessive:²

In substance, the question for resolution is whether it was open to the Tribunal, in all the circumstances, to suspend Mr Khosa from practising for six months. This question is to be answered in light of the well-established principle, referred to above, that the Tribunal's jurisdiction with respect to the regulation of the profession is not to be exercised for the purpose of punishing the practitioner concerned, but for

¹ *Khosa v Legal Profession Complaints Committee* [2017] WASCA 192.

² Principal decision [212] - [223].

the protection of the public and the maintenance of the reputation and standards of the legal profession.

The references, given without recognition of the deliberate breach of the Undertaking, are ultimately of limited significance. The findings relating to financial hardship were of a limited nature, and, in any event, any hardship is necessarily a secondary consideration, given that the dominant purpose of the disciplinary regulation of the legal profession is protection of the public by the makings of proper standards within the profession.

In this case, the following matters are of most particular relevance. First, as explained in *Detata*, the performance by practitioners of their undertakings is of fundamental importance. Mr Khosa's conduct in deliberately breaching his undertaking was a serious breach of his professional obligations.

Secondly, on the Tribunal's findings, Mr Khosa's lapse into a 'degree of dishonesty' was an isolated lapse by a single act, not involving a course of conduct, and did not reflect an innate lack of character or of the trustworthiness required of a solicitor. Also, it was an 'isolated incident' in the sense that there had been no history of professional disciplinary matters involving Mr Khosa, other than one relatively minor matter resolved by consent in 2015.

Thirdly, on the Tribunal's findings, Mr Khosa gave the Undertaking effectively under sufferance. It was demanded of him at the last minute, he was justified in regarding the requirement as unreasonable, and he was unable to obtain instructions within the limited time available. These matters tend to explain, but of course do not justify, his subsequent succumbing to temptation.

Fourthly, whilst the breach of the Undertaking served Mr Khosa's general interest by placating his clients, it did not involve direct personal enrichment.

Fifthly, the character of the misconduct is to be noted. A wilful breach of undertaking is not honest conduct. Nor is the misapplication of trust money where the practitioner is in reckless disregard of whether he is authorised under the terms of the undertaking to release that money. In each case the conduct is not at the lower end of the range of seriousness in relation to breaches of undertakings. However, dishonesty, like other forms of misconduct, has grades of seriousness. As the Tribunal recognised, the subjective element of Mr Khosa's breach was more serious than the breach in *Detata* because it was a knowing breach.

Sixthly, on the Tribunal's findings, whilst Mr Khosa is not yet remorseful, he has taken a step towards remorse. He has shown insight into the importance of performing an undertaking once given, and has indicated that he would not allow the same situation to occur again. Also, the Tribunal evidently did not consider that Mr Khosa should be required to

undertake, for example, further legal education in legal ethics or legal practice.

Seventhly, the conduct is not aggravated by evidence that the Undertaking was relied on to the 'substantial detriment' of the party to whom it was given. There is no indication of any loss suffered by the party to whom the Undertaking was given.

In these circumstances, personal deterrence is of limited significance given that the Tribunal appears to have accepted that Mr Khosa has sufficient insight to ensure that he would not breach an undertaking in the future. General deterrence, for the protection of the public and the maintenance of the reputation and standards of the legal profession requires an appropriately serious response to the misconduct, consistently with the principle that the Tribunal should assure the public that 'serious lapses in the conduct of legal practitioners will not be passed over or lightly put aside, but will be appropriately dealt with'.

Although the Tribunal found that Mr Khosa would be fit to resume practice at the end of the suspension period, the burden of its reasons appear to be not that he is presently unfit to practise, but that there is no reason to doubt that he would not be fit to return to practise if he were suspended for six-months.

Although the Tribunal emphasised the significance of general deterrence, in the circumstances of this case outlined ... above, in our respectful view it cannot be concluded that the practitioner's suspension from practice for a period of six months is necessary for the protection of the public and the maintenance of the reputation and standards of the profession. While, given the importance of undertakings being honoured, Mr Khosa's deliberate breach of his undertaking and his absence of remorse meant that it was open to impose a short period of suspension, in our view all relevant goals including denunciation and deterrence would have been fulfilled by a substantially shorter period of suspension than the 6 months imposed by the Tribunal. In all the circumstances, we are satisfied that in ordering the suspension of six months, the Tribunal's decision is unreasonable or plainly unjust. (footnotes omitted)

13 We also observed, in the principal decision, that a suspension order entails greater denunciatory and deterrent effect than a reprimand and fine.³

14 Having considered the submissions of senior counsel for the appellant and counsel for the respondent, we formed the view that in all the circumstances of this case, a fine would not be adequate for the protection of the public and the maintenance of the reputation and standards of the profession. The appellant's breach of his undertaking

³ Principal decision [194].

involved a serious breach of his professional obligations. It was deliberate. It was not honest conduct. As we indicated in the principal decision, it was open to the Tribunal to conclude that he had not demonstrated remorse. Insofar as senior counsel for the appellant submitted at the hearing on 20 October 2017 that the appellant had 'personally been remorseful' and that he 'sincerely apologises', these statements at this late stage carry little weight in the overall assessment of an appropriate penalty in the circumstances of this matter. Also, the appellant's personal circumstances, and the effect of a suspension order on his livelihood and income are matters which, for the reasons given in the principal decision, do not carry any significant weight in the present context. There is no substance to senior counsel's submission that the imposition of a penalty would involve a 'significant jump' in the appropriate type of sanction. There has been no occasion for this court (so far as is known) to consider an appropriate penalty for a deliberate breach of an undertaking to a fellow practitioner where there has been no timely, demonstrable remorse.

15 In our view, a suspension for some period was appropriate. Had there been early and unqualified remorse for the misconduct, and a plea of guilty, a fine may well have been appropriate, but that did not occur.

16 As to the length of the suspension, having regard to all the factors identified in the principal decision which we have set out above, and to the submissions advanced by the parties on 20 October 2017, it seemed to us that a relatively short suspension would achieve all that was necessary for the protection of the public and the maintenance of the reputation and standards of the profession in this case. In our view, a two-month suspension was appropriate. The court made orders to that effect on 20 October 2017.