

SOUTH AFRICA / JUDGMENT

Cape Law Society v Mlindazwe (2857/18) [2020] ZAECHMHC 8 (10 March 2020)

[2020] ZAECHMHC 8

COURT

Eastern Cape High Court, Mthatha

BEFORE

B.R. Tokota, I.T. Stretch

CASE / FILE NUMBER

2857/18

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE LOCAL DIVISION, MTHATHA)

Case No: 2857/18

In

the matter between:

THE
CAPE LAW
SOCIETY Applicant
and
MZOBANZI
VICTOR MLINDAZWE
Respondent

JUDGMENT

TOKOTA J:

- [1] On 30 March 2016 the applicant brought an application seeking an order restraining and interdicting the respondent from practising as an attorney of this court pending the final determination of an application to strike his name from the roll of attorneys. On 29 May 2018 this court made an order suspending the respondent from practising as an attorney pending the finalisation of this application. The applicant was at the same time ordered to effect personal service on the respondent and to launch this application within four weeks of the date of the order. On 22 June 2018 the applicant launched an application seeking an order for the removal of the name of the respondent from the roll of attorneys in terms of

section 22(1)(d) of the Attorneys Act No.53 of 1979 (the Act).

- [2] The respondent, both in the answering affidavit and in subsequent heads of argument, took four points in limine. These were: first, he contended that the applicant failed to effect personal service on him; second, that this application was not served on him within four weeks of the granting of the interim relief; third, the applicant has no locus standi to bring this application as it failed to comply with its own rules before launching it; fourth, the replying affidavit was filed out of time and no condonation application was made by the applicant. Furthermore, the deponent to the replying affidavit was not the same person who deposed to the founding affidavit.
- [3] The last point can summarily be disposed of by simply saying that the respondent should have invoked the provisions of Rule 30 of the Uniform Rules of Court if he was prejudiced by the irregular step committed by the applicant. He failed to do so. He cannot now complain. There is no substance in the first three points. In my view they are flimsy points which do not even merit comment. Suffice it to refer to the well known case of the Appellate Division where Schreiner JA remarked:

‘ . . . technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.’[1]

The respondent was represented by senior counsel when the matter was argued before us. We are indebted to counsel for the helpful heads of argument wherein these flimsy points were thankfully no longer pursued.

Background

- [4] The background to the application can be summarised as follows:

An audit in respect of the respondent’s trust funds was conducted for the period ending 28 February 2014. The auditor found that

- (a) money had not been banked on the first reasonably expected banking day following its receipt[2]
- (b) one of the trust creditors had a debit balance;[3] (c) fees transferred did not correspond with identifiable and properly recorded fees.[4] The respondent had withdrawn an amount of R75 000 from trust funds belonging to Cross-Med Health Centre (Pty) Ltd (Cross-Med) who was one of his clients.
- [5] The respondent received a qualified audit report flowing from the aforesaid irregularities.

[6] On 28 October 2014 the applicant called upon the respondent to account for the audit queries. The respondent failed to respond to the applicant's request. On 23 February 2015 the applicant's Council resolved to charge the respondent with unprofessional conduct, inter alia, for failing to respond to correspondence. The respondent was also charged with misconduct in respect of the aforesaid irregularities.

On 26 February 2015 the applicant addressed a letter to the respondent requiring him to respond to the charges by 13 March 2015. On 27 February 2015 the respondent addressed a letter to the applicant seeking an extension of time to submit a report as he was awaiting information from his auditors. On 19 March 2015 the respondent finally gave an explanation for the alleged irregularities. However, he only explained the use of the R75 000. Out of this amount R20 000 was allegedly used for expenses incurred for court processes etc.

[7] The explanation given in respect of the R75 000 was that in 2010 he was approached by a Mr Mda, the legal adviser and chairperson of the board of Cross-Med, requesting the services of his firm of attorneys to collect and receive in its trust account monies deposited by medical practitioners from Mthatha and surrounding areas. These monies were intended to be used for the establishment of a new Private Hospital referred to as Cross-Med Health Centre (Pty) Ltd t/aMthatha Private Hospital. The sole director and majority shareholder was one Dr Ongama Yako.

[8] The respondent's firm accepted the request to act for Cross-Med and to receive monies. He then furnished Dr Yako and Mr Mda with the bank details of his trust account. Thereafter deposits were made into the trust account. Monies that were collected were subsequently transferred to Cross-Med for building construction. After the transfers an amount of about R200 000 remained in the trust account.

[9] At some stage later the respondent was approached by one of his clients who needed money for, inter alia, payment of university fees for her children. The respondent approached Mr Mda who was at the time in the company of Dr Nazo and Dr Sodo (the shareholders of Med-Cross) and requested permission to make use of the Med-Cross trust funds. He did not mention the amount at that stage. Mr Mda acceded to the request but required him to account for the amount used.

[10] Mr Miller for the applicant, contended that the respondent took the money before permission was granted and only advised Mr Mda that he had used the money thereafter. Mr Gwala SC for the respondent argued that, on the totality of the evidence it is clear that permission was obtained before the withdrawal of the funds. I agree with Mr Gwala that, on a balance of probabilities, the respondent first obtained permission from Mr Mda before transferring the money held in trust. I say so because Mr Mda, whose confirmatory affidavit has not been disputed by the applicant, confirmed what the respondent had said, namely that he was approached by the respondent seeking permission to use company funds which he consented to.

- [11] The applicant's counsel pointed out that there existed a discrepancy between the letter of explanation and the interdict application about the money 'loaned'. To my mind it is common cause that the respondent withdrew money from his client's funds. I find that it is more probable than not that he used the money with the consent of Mr Mda who was acting as an adviser to Med-Cross. The applicant's counsel further contended that because Mr Mda is not a director of Med-Cross which is a private company, he could not be the chairperson thereof, to which the respondent's counsel replied that a chairperson of a board need not be a director. The argument was not pursued any further on the applicant's behalf.
- [12] The Law Society has locus standi to bring an application to remove from the roll of attorneys any person who has been admitted as an attorney and whom it considers not to be a fit and proper person to practise as such. The application is brought in terms section 22 of the repealed Attorneys Act No. 53 of 1979 (the Act) since the cause of action arose before the coming into operation of the Legal Practice Act No. 28 of 2014, on 1 November 2018.
- [13] Section 22(1)(d) of the Act provides:
- 'Any person who has been admitted and enrolled as an attorney may on application by the society concerned be struck off the roll or suspended from practice by the court within the jurisdiction of which he or she practises –...
- if he or she, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney; ...'
- Where an attorney has been guilty of conduct which is incompatible with the requirement of being a fit and proper person within the meaning of the Act, there is obviously an onus on him to satisfy the court that he is a fit and proper person, despite his conduct. He must show, on a balance of probabilities, that his lapse is not of such a nature that he may be declared unfit to practise as an attorney.
- [14] The objects of the Law Society are set out in section 58 of the Act. One of these is to maintain and enhance the prestige, status and dignity of the profession. It is for this reason that it will jealously guard against any conduct that is likely to tarnish the profession. In order to maintain the integrity of the profession it has a duty to protect members of the public against unscrupulous attorneys.
- [15] Section 22 of the Act gives the Law Society the power to bring an application for the striking off or suspension of a person whose conduct is considered to be unworthy of being an attorney. In so doing the Law Society must establish that such an attorney has committed misconduct and that the misconduct concerned is of such a nature that it would be intolerable to have such person practising as an attorney. The court must then weigh the offending conduct against the conduct expected of an attorney.
- [16] In *Jasat v Natal Law Society* 2000

- (3) SA 44 (SCA), Scott JA analysed section 22 and concluded that the section contemplates a three-staged enquiry.[5] First, the Court must decide whether the alleged offending conduct has been established on a preponderance of probabilities.[6] Second, whether the person concerned 'in the discretion of the court' is not a fit and proper person to continue to practise. Third,

whether in all the circumstances the person in question has to be removed from the roll of attorneys or whether an order suspending him from practice for a specified period will suffice.

Has the applicant established the offending conduct of the respondent?

- [17] It is now expedient to examine the three-staged enquiry. The first enquiry involves factual findings. The applicant complains that the respondent has misappropriated funds. Misappropriation connotes the theft of something entrusted to your care and using it for your own good. It is so that the respondent withdrew R75 000 belonging to his client. He has explained that he obtained permission from the client to take the money. He was communicating with his client through their legal adviser Mr Mda. If this is accepted, and I have indicated that the explanation is acceptable, can we say that the withdrawal of the funds amounted to theft? The answer is no.

- [18] Counsel for the applicant referred to a contradiction in Mr Mda's version in the interdict application. Three problems arise from this. First, Mda's confirmatory affidavit to the respondent's version has not been challenged. Second, the interdict application does not form part of these proceedings and has not been placed before us. Third, the money has been paid back to the client without any complaints or demand for payment thereof. I conclude therefore that on a balance of probabilities, it has not been established that the respondent stole the money and therefore misappropriated it.

- [19] This conclusion does not mean that this court approves of the use of a client's trust funds, even with his consent. In my view it is unbecoming and unethical of attorneys to borrow money from clients.[7] If the respondent needed money he should have issued an invoice billing the client for fees owed, if anything. Therefore his conduct was unprofessional. Furthermore the respondent contravened the Rules of the Society, and in particular Rules 13.13.1, 13.13.4 and 13.10.3.1. In this respect the applicant has shown that the respondent is guilty of misconduct.

Is the respondent a fit and proper person to continue practising as an attorney?

- [20] In respect of the second stage of the enquiry, the court must exercise its discretion, regard being had to the conduct complained of, and decide whether on the facts of this case the respondent is not a fit and proper person to continue to practise. As expressed by Scott JA in Jasat[8]:

‘(i)t would seem clear, ...that in the context of the section, the exercise of the discretion referred to involves in reality a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, a value judgment.’

If one has regard to the conduct of the respondent with respect to the R75 000, it would seem that he was motivated by sympathy to assist a client who needed money for school fees. There was money available in this client’s family trust and therefore the repayment of the amount was not remote. He also obtained consent from his other client to take the money.

[21] It is true that the conduct that has been proved to be a breach of the Rules is reprehensible. Be that as it may, I am of the view that at best it amounts to a dereliction of duties. No element of dishonesty has been shown and I did not understand the Law Society to be so contending. The conduct relating to the R75 000 is neutralised by the fact that it was done with the full knowledge and consent of the client. Consequently I am of the opinion that it cannot be said that the respondent is not a fit and proper person to continue to practise as an attorney.

Sanction

[22] Having found that the respondent has breached the Rules of the Society, it is incumbent on us to impose an appropriate sanction. In this regard the court must examine the nature of the conduct complained of, the extent to which it reflects upon the respondent’s character or shows him to be unworthy to remain in the ranks of an honourable profession, the likelihood or otherwise of a repetition of such conduct, and the need to protect the public at large.

[23] Mr Gwala submitted that the court should find that the conduct of the respondent, in so far as it relates to the trust deficit, in the circumstances of this matter, did not amount to misconduct. In the alternative, he submitted that in the event that this court finds that it did, it is in any event not of such a serious nature as to attract the ultimate penalty. He submitted that this is a typical case where the sanction of a reprimand would be appropriate; alternatively, that the respondent should be suspended from practising for his own account with or without conditions. In this respect the respondent’s counsel suggested that if this court is inclined to impose suspension with conditions, that a refresher attorneys’ practical management course would be appropriate.

[24] During the course of argument, I asked Mr Gwala to identify which of the Rules had been contravened by the respondent particularly in relation to the R75 000. He responded that he could not find any Rule in this regard. Mr Miller for the applicant did not make submissions to the contrary. Mr Miller nevertheless contended that even if none of the rules have been contravened, this court should, in any event, find the respondent’s conduct to have been unbecoming of an attorney, citing Dube as support for the contention.[9]

- [25] Although each case has to be dealt with on its own facts, comparison always serves as a guideline in deciding an appropriate sanction. I find that the conduct of the respondent in withdrawing the R75 000 from the client's trust funds was irregular and inappropriate. If conduct of this nature were to be condoned it could put members of the public at risk, particularly if they fell into the hands of unscrupulous attorneys. The sanction is not primarily aimed at punishing the attorney concerned but at the protection of the members of the public.
- [26] The Supreme Court of Appeal in Dube^[10] aptly made a comparison of judicial precedent relating to sanctions imposed on offending practitioners and came to the conclusion that suspension was an appropriate sanction. It is unnecessary to recite those cases here. Suffice it to say that they are likewise distinguishable from the present matter. I have already referred to the alleged purpose for which the money was withdrawn. The respondent's action cannot be classified as dishonest, nor has the applicant succeeded in proving it to have been such. In my view, the following extenuating factors should be taken into account in considering an appropriate penalty:
- (a) The money was withdrawn with the consent of the client; (b) It has been paid back;
 - (c) The client has not complained of prejudice;
 - (d) At the time of judgment, the respondent would have been barred from practising for 21 months; (e) Even if there is merit in the argument that the respondent contradicted himself or that his explanation has not been entirely candid, it does not follow that 'any untruthfulness however trifling will render an attorney unfit to practise and liable to be struck off the roll.'^[11]
- [27] Insofar as the breach of the Rules is concerned, we are likewise not dealing with acts of dishonesty. At worst for the respondent this conduct amounts to a dereliction of duty. It is not likely to recur. It does not warrant the ultimate penalty sought by the applicant.
- [28] In dealing with the choice between striking the respondent's name from the roll of attorneys and suspending him, the court in *Malan and Another v Law Society of the Northern Provinces* [2008] ZASCA 90; 2009
- (1) SA 216 (SCA) at para.7 observed:
- '(I)n deciding on whichever course to follow the court is not first and foremost imposing a penalty. The main consideration is the protection of the public.'
- [29] If there is no evidence that the conduct is likely to persist in future it cannot be said that the attorney concerned is not a fit and proper person to be allowed to continue to practise. To sum up, if a court finds that an attorney is guilty of unprofessional conduct but that such conduct does not make him unfit to continue to practise, then 'the court may discipline the attorney by suspending him from practice with or without conditions or by reprimanding him'.^[12]

[30] In the circumstances of this case I am of the opinion that the ultimate sanction of striking the respondent's name from the attorneys' roll is not justified, and that a conditional suspension will suffice.

Costs

[31] On the question of costs it cannot be gainsaid that the applicant was obliged to bring this application in order to protect not only members of the public but the very integrity of the attorneys' profession. It has been successful in doing so. The general rule in matters of this kind is that the respondent has to pay the Law Society's costs on the scale as between attorney and client. This is so because the applicant is not an ordinary litigant. It performs a public duty. 'It is obliged to approach this court when a complaint, in particular one involving an act of dishonesty, is lodged against an attorney.' [13] On the other hand, it cannot be said that the respondent's resistance to an application seeking the ultimate penalty was unreasonable and litigious, particularly in that this profession appears to have been the respondent's primary source of income. He has also not been found guilty of an act of dishonesty. In the premises I am of the view that a costs order on the usual party and party scale is appropriate.

[32] In the result the following order is made:

- (a) The respondent is suspended from practising as an attorney for his own account for a period of one year.
- (b) The suspension referred to in (a) above is suspended for three years from the date of this order on the following conditions:
 - (i) that the respondent is not found guilty of a contravention of any of Rules 13.10.3.1, 13.13.1 and 13.13.4 of the applicant's Rules committed during the period of suspension; and
 - (ii) that the respondent is not found guilty of unprofessional, dishonourable or unworthy conduct (in terms of the applicant's Rules read with section 116(2) of the Legal Practice Act 28 of 2014) committed during the period of suspension.
- (c) The respondent is ordered to pay the costs of the application.

B.R. TOKOTA

JUDGE OF THE HIGH COURT

I agree:

I.T. STRETCH

Counsel for the applicant: T. Miller

Instructed by Wheeldon Rushmere & Cole Inc.

GRAHAMSTOWN

c/o J.A. le Loux Attorneys MTHATHA

Ref. J. le Roux

Counsel for the respondent: M. Gwala SC and P.G. Mhlana

Instructed by Sicwetsha Attorneys Inc.

MTHATHA

Ref. MVM/Civil/sicwetsha-2018

Date heard: 13 February 2020

Date handed down: 10 March 2020

[1]Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A) at 278F

[2] A contravention of Rule 13.13.1 of the Rules of the Cape Law Society (the Rules)

[3] Rule 13.13.4

[4] Rule 13.10.3.1

[5] Para.10

[6] See Nyembezi v Law Society, Natal 1981 (2) SA 752 (A) at756H-758A; Kekana v Society of Advocates of South Africa [1998] ZASCA 54; 1998

(4) SA 649 (SCA) at 654D in relation to section 7 of the Admission of Advocates Act 74 of 1964; Reyneke v Wetsgenootskap van die Kaap die Goeie Hoop [1993] ZASCA 161; 1994 (1) SA 359 (A) at369D.

[7]The Law Society of the Northern Provinces v Dube [2012] 4 All SA 251 (SCA) para. 21

[8]Para. 10 ibid

[9] Footnote 6 supra para.25

[10] Ibid

[11]Jasat (above) para.12

[12]Malan (above) at para.5; Law Society of the Northern Provinces v Stuart and Others 2019 (3) SA 535 (GP) at para.9.

[13]Dube (above) at para. 33

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