

SOUTH AFRICA / JUDGMENT

# Hlahla and Another v Law Society of the Northern Provinces and Another (3497/2009) [2011] ZANWHC 48 (25 August 2011)

[2011] ZANWHC 48

## COURT

North West High Court, Mafikeng

## BEFORE

A A Landman, M M Leeuw

## CASE / FILE NUMBER

3497/2009

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**Source record****IN THE NORTH****WEST HIGH COURT****MAFIKENG****CASE NO.:****3497/2009****In the matter**

between:

PHEMELO ADAM  
HLAHLA .....1st  
APPLICANT  
SAMUEL  
MOROKANE TEBOGO MOTLHAMME .....2ND  
APPLICANT  
and  
THE LAW  
SOCIETY OF THE NORTHERN  
PROVINCES  
.....1ST  
RESPONDENT  
THE LAW  
SOCIETY OF BOPHUTHATSWANA .....2ND  
RESPONDENT  
APPLICATION  
FOR LEAVE TO APPEAL  
LEEUEW JP AND  
LANDMAN J  
DATE OF  
HEARING: 12 AUGUST 2011  
DATE OF

JUDGMENT: 25 AUGUST 2011  
FOR THE 1ST  
APPLICANT: ADV PISTOR SC  
FOR THE 2ND  
APPLICANT: ADV LAVINE  
FOR THE 1ST  
RESPONDENT: MR LAMEY

## JUDGMENT

LANDMAN J:

- [1] The applicants are the first and second respondents in the application launched by the Law Society of the Northern Provinces (herein the respondent) for the striking off of their names from the roll of attorneys. Judgment was delivered in that application on 20 August 2010 and reasons were supplied on 19 November 2010.

The first applicant

- [2] The first applicant filed amended grounds upon which the application for leave to appeal is based.

- [3] These grounds are:

- (1) The learned Judges erred in law and on fact by finding (in paragraph 45 of the judgment) that the first applicant is not fit and proper to practise as an attorney.

(1A) The learned Judges imposed a period of suspension (5 years) which is disturbingly inappropriate, bearing in mind all the relevant evidence. The learned Judges should have imposed a shorter period of suspension, alternatively they should have suspended a substantial part of the period of 5 years.

- (2) The learned Judges failed to take into account the fact that the applicant did not himself commit any act of dishonesty or irregularity. The learned Judges should have found that the applicant's only blameworthy behaviour was the fact that he placed too much trust in his partner.

- (3) In respect of the Mayisela matter the learned Judges failed to take into account the fact that there was no evidence on record to show that, even if payment of counsels' fees was made prior to the date of final dissolution of the partnership between the applicant and Mr Motlhamme, the applicant was involved or even aware of the fact that payment to counsel was irregular.

- (4) The learned Judges failed to take due cognisance (in, inter alia, paragraph 17 of the judgment) of the fact that the applicant relinquished his signing powers on both the Trust and Business cheque

books of the partnership on 30 October 2007.

- (5) The learned Judges should have found that the only contravention of the relevant Rules committed by the Applicant was that he failed to report the dissolution of his partnership to the Law Society.
- (6) The learned Judges should have found that there was no evidence on record to conclude on a balance of probabilities that the direction of the Law Society to the partnership to produce the accounting records of the partnership came to the notice of the applicant.
- (7) The learned Judges erred in finding (in paragraph 42(a) of the judgment) that the applicant is guilty of contravening “Section 78(1) of the Act read together with Rule 69.3.1 of the Rules in that the total amount in the trust banking account of the firm was less than the total amount of the firm’s trust creditors”. The learned Judges should have found that the available evidence indicate that, on probabilities, the applicant was not responsible for the fact that the amount in the Trust account of the firm was less than the amount of the trust creditors.
- (8) The learned Judges erred in finding (in paragraph 42(b) of the judgment) that the applicant is guilty of contravening “Rule 68.7 of the Rules read together with Sections 78(4) and 78(6) (c) of the Act in that the firm did not within a reasonable time after the performance or earlier termination of any mandate account to its clients in writing”. The learned Judges should have found that the available evidence indicates that, on probabilities, the applicant was not responsible for the failure to timeously report to clients. In particular the learned Judges should have found that the failure to report to clients occurred at the stage after the dissolution of the partnership and in circumstances beyond the knowledge and control of the applicant.
- (9) The learned Judges erred in finding (in paragraph 42(d) of the judgment) that the applicant is guilty of contravening “Rule 68.8 of the Rules in that the firm did not pay any amount due to a client within a reasonable time unless otherwise instructed.” The learned Judges should have found that the available evidence indicates that, on probabilities, the applicant was not responsible for the failure to timeously pay clients. In particular the learned Judges should have found that the failure to pay clients occurred at a stage after the dissolution of the partnership and in circumstances beyond the knowledge and control of the applicant.
- (10) The learned Judges erred in finding (in paragraph 42(e) of the judgment) that the applicant is guilty of contravening “Rule 70.3 in that the firm did not ensure that the accountant’s report be furnished by an account in terms of Rule 70.4 of the Rules is so furnished within or at the required time”. The learned Judges should have found that the available evidence indicates that, on probabilities, the applicant was not responsible for the failure to timeously file the require report. In particular the learned Judges should have found that the failure to timeously file the report occurred at a stage after the dissolution of the partnership and in circumstances beyond the knowledge and control of the applicant.

- (11) The learned Judges erred in finding (in paragraph 43(b) of the judgment) that “trust monies were misappropriated to pay debts of the partnership” without duly taking cognisance of the fact that the said misappropriation was conducted by Mr Motlhamme in the name of the partnership after the dissolution of the partnership and in circumstances unknown to the applicant and beyond the control of the applicant.
- [4] Mr Pistor SC, who appeared for the first applicant, submitted that:
- (a) There is no evidence to justify an inference or finding that the first applicant himself contravened any of the said provisions and the finding that he is guilty of contravening the provisions of the Attorneys Act is solely based on the finding by the court that the first applicant was a partner at the time when the said contraventions were committed by his co-partner (the second applicant). See paragraph 42 of the

**judgment.**

- (b) The main fault on the part of the first respondent is that he placed too much trust in the second applicant. The fact that he has left it in the hands of the second applicant to wind up the firm was clearly a mistake. However, it does not amount to anything irregular since there was at that stage no reason for the first applicant to mistrust the second applicant. Even if it were to be found that the partnership had not dissolved by 30 October 2007, then still it was not irregular for the first applicant to leave the firm in the hands of the second applicant being a duly admitted attorney.
- (c) The admission by the first applicant that the partnership dissolved in October 2008 was an error and this court relied upon that date in examining his responsibilities towards his clients.
- [5] Mr Lamey, for the first respondent, submitted that the first applicant had made no such error. The first applicant in terms of the dissolution agreement would leave the practice at Montshiwa and conduct his separate practice from Theresa House. However, in an affidavit filed with the respondent commissioned on 27 February 2009 the first applicant stated that he was practising in partnership with the second applicant and at Montshiwa. Mr Pistor submitted that this too could be explained. I am of the view that the factual situation may have therefore been worse for the first applicant than I had found to be the case in my judgment.
- [6] I am of the view that another court will not reasonably find that 31 October 2008 was not the relevant date.
- [7] Mr Pistor submitted, as regard the sanction that the period of suspension is so long that it justifies interference by a Court of Appeal. In doing so Mr Pistor builds his argument on what he contends to be the crucial date. I have dealt with his contention. I do not find it necessary to transverse the further submissions based upon this date.

- [8] Mr Pistor, with reference to the reasons given for suspending the first applicant from practice, submits that this Court erred in one or more or all of the following respects:
- (a) This court took into account the transgressions of the second applicant which should not have been taken into account, bearing in mind the circumstances of the case.
  - (b) The first applicant's discomfort in proceeding with the partnership was based on a disagreement on major policy decisions regarding the conduct of the practice as this court has indeed found. The discomfort had therefore no link with any transgressions of the law by the second applicant and should not have been taken into account against the first applicant.
- [9] I need not deal with the submission in paragraph (a) as it relates to the crucial date. As regards paragraph (b) the discomfort alluded to in my judgment was a factor which favoured suspension rather than striking off. Its consideration were to the first applicant's advantage.
- [10] It was also submitted that it cannot be established on the available evidence that the first applicant continued to practice as an attorney after he left the firm in October 2007. He was therefore not called upon to open any trust account and a failure to inform the Law Society of his new trust account was therefore not an irregularity. Even if he had opened a new trust account, then and in that event, the failure of the first applicant to inform the Law Society of his new address and of his new trust account should not be considered as anything more serious than an "inattention".
- [11] As far as the reliance in my judgment on *Incorporated Law Society, Transvaal v Visse and Others* 1958 (4) SA 115 (T) is concerned there is no merit in the criticism. As Mr Lamey points out, in *Botha and Others v Law Society Northern Provinces* 2009 (3) SA 329 (SCA) the Supreme Court of Appeal followed with approval, *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T) and Visse's cases with reference to the onerous duty of keeping proper accounting records.
- [12] The Supreme Court of Appeal in Botha's case, with reference to the keeping of proper accounting records, especially also with regard to the proper keeping of trust accounts stated the following:
- "If any attorney cannot deal properly with the matter, he must not undertake it. This is an absolute rule; it has to be so – the public is at risk."*
- [13] Lastly Mr Pistor, conceded that each case has to be considered on its own facts. However, he submitted that the period of suspension of an attorney should, as a general rule and as far as possible be more or less similar to that imposed in similar judgments. He also submitted that the five year period of suspension, imposed in respect of the first applicant, is substantially longer than the periods of suspension in cases of a more serious nature. I am of the view that there is a reasonable possibility that another court may find that the period of suspension is too long.

[14] In consequence I would grant leave to appeal against the length of the suspension.

Second applicant

[15] It is the second applicant's case that:

- (a) Having regard to the circumstances of the second applicant, suspension from practice would be a sufficient sanction against the second applicant. And this would also serve adequately to protect the public.
- (b) It appears that this Court may have misdirected itself in analysing the second respondent's conduct and for that reason came to the conclusion that he should be struck off the roll of attorneys. The second applicant submits that it is reasonably possible that a Court of Appeal would come to a conclusion different from that of this court.
- (c) Furthermore, the penalty imposed on the second respondent is harsh and carries very significant and dire consequences for him.

[16] Mr Lavine correctly observed that of the complaints made against the second applicant, the gravest and the one which might suggest dishonesty, appears to be the admitted allegation that he utilised trust monies to pay creditors of the firm.

[17] Mr Lavine submitted that the following is relevant in considering the complaints relating to the misappropriation of trust money:

- (a) It does not appear from the papers that the second applicant denied that he utilised the trust monies in order to pay advocates' fees for the firm. He has never tried to hide this.
- (b) The trust monies were not used for personal enjoyment, but for expenses incurred in conducting litigation and to avoid the blacklisting of the firm – something which would potentially have had a detrimental effect not only on the applicants but also on their clients.

- (c) The second applicant has stated that the complainants will be paid (but I must add that the complainants had not been paid when the order was made).
- (d) Without seeking to make light of the illegitimate use of trust monies, the circumstances do not suggest that the applicants intended permanently withholding the trust funds from their rightful recipients.
- (e) The African National Congress had undertaken to pay the amounts owing by it to the applicants' firm. This would have been substantially more than the amount necessary to pay counsel which is what the trust monies were used for.

- (f) None of the aforementioned factors justify misuse of trust monies, however, they do suggest that the present matrix of facts should not be considered to be an ordinary case of misappropriation of trust monies. They justify a conclusion that the second applicant's conduct cannot be considered to be dishonesty in the ordinary sense of the term.
- [18] It is dishonest to utilize the monies entrusted to one as an attorney to keep one's practice afloat. Moreover the second applicant was unfit to practice as an attorney by virtue of his lack of appreciation of the general duties of an attorney but more so as regards his duties in respect of trust funds.
- [19] Mr Lavine dealt with three other issues, the failure to provide source documents, the failure to provide the respondent with information and his misleading the respondent into believing he was hospitalised.
- [20] The second applicant's actions have been examined in the judgment. It is unnecessary to traverse them here save to say that, even if the second applicant's version were to be accepted, these findings do not have a material effect on the critical decision that the second applicant is unfit to practice as an attorney and that striking off is the appropriate sanction.
- [21] In the circumstances I am not convinced that there is a reasonable prospect that another court would come to a different conclusion. In the result I would dismiss the application for leave to appeal with costs.
- [22] In the result:
- 1.(a) Leave is granted to the first applicant (first respondent in the main application) to appeal against the whole order made on 20 August 2010 insofar as it relates to him.
  - (b) Costs are to be costs in the appeal.
  2. The application of the second applicant (second respondent in the main application) is dismissed with costs.

A A LANDMAN

JUDGE OF THE HIGH COURT

I agree

M M LEEUW

JUDGE PRESIDENT

ATTORNEYS:

FOR THE APPLICANTS : JERRY SITHOLE ATT

FOR THE 1ST RESPONDENT : NIENABER & WISSING

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