

SOUTH AFRICA / JUDGMENT

Ncongwane v Tarcia NO and Others (A737/2010) [2012]

ZAGPPHC 32 (16 February 2012)

[2012] ZAGPPHC 32

COURT

North Gauteng High Court, Pretoria

BEFORE

S.A.M. Baqwa, H.J. Fabricius

CASE / FILE NUMBER

A737/2010

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REPORTABLE

IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

GAUTENG, PRETORIA

Case

no: A737/2010

DATE:16/02/2012

In

the matter between:

Mandla

Macbeth

Ncongwane.....Appellant

And

J

Tarcia

N.O.....1st

RespondentAY Bhayat

N.O.....2nd

Respondent

G

Nochumsohn

N.O.....3rd

Respondent

Law

Society of the Northern

Provinces.....4th

Respondent

The Minister of Justice &.....	5th
RespondentConstitutional Development Black Lawyers Association.....	6th
Respondent Law Society of South Africa.....	7th
Respondent	

JUDGMENT

Baqwa A.J

- [1] The Appellant herein, Mandla Macbeth Ncongwane is an adult male person practising as an attorney with the firm Macbeth Ncongwane

Attorneys situated at Macbeth Law Chambers 24 Drysdale Street, Mbombela.

- [2] The Law Society of the Northern Provinces which is the Fourth Respondent this appeal instituted disciplinary action against the Appellant and its disciplinary committee appointed the First to Third Respondents to conduct disciplinary proceedings against the appellant.
- [3] The Appellant was originally charged with five counts regarding "unprofessional or dishonourable or unworthy conduct on the part of the practitioner". This occurred subsequent to a complaint which was lodged against the appellant by one Mr C Smith of Nelspruit and his client O.B Peters.
- [4] The charges that were put to the Appellant were phrased as follows:
- "1. On 1 December 2006, you misled the court by indicating that you have lodged a Review Application, and thus causing the eviction order obtained under case number 9251/2006 in the Magistrates Court Nelspruit to be set aside; and
2. That you failed to notify the opposing attorney of record about the application brought on 1 December 2006.
3. That you instructed you client on receipt of the order on 1 December 2006 to re-occupy the property without intervention of the Sheriff causing your client to overpower the Security Guard, braking (sic) locks and entering the house; and

4. That you, after your Order obtained on 1 December 2006 being set aside and costs de bonis propis awarded against yourself on the 8 December 2006, indicated to your client that you have lodged and (sic) Appeal and furnishing them with a notice and thus instructing them to re-occupy the property without intervention of the Sheriff causing you client to overpower the Security Guard, braking (sic) locks and entering the house; and
5. That you, after the Spoliation order being granted on 12 December 2006, lodged an Appeal against the Spoliation Order and instructing

your clients after furnishing them with notice thereof to re-occupy the property without intervention of the Sheriff causing your client to overpower the Security Guard, braking (sic) locks and entering the house."

- [5] At the conclusion of the disciplinary hearing the Appellant was found guilty of charge 2 and not guilty on charge 1,3,4 and 5.
- [6] In the light of the above I am not going to deal with the findings of the disciplinary committee in so far as they dealt with the other charges.
- [7] The Appellant contends that the Respondents erred in disregarding the evidence showing that the Appellant was entitled to bring an application in terms of Rule 55(9) of the Magistrate's court rules which would entitle him to decide on whether to bring an application on notice or ex parte.
- [8] A brief summary of the sequence of events that led to charge 2 serves to put matters in perspective:

8.1. Prior to 1 December Attorney D.M Van Schalkwyk was Mr Peters' attorney of record and the latter was involved in an eviction action with one Mrs Mogane who was represented by the Appellant.

8.2. On the morning of the 1st of December 2006 pursuant to Mrs Mogane's eviction from the premises in question on that day:

8.2.1. Mrs Mogane instructed Appellant to launch an application in court for the staying of the eviction order.

8.2.2. The Appellant ascertained that Mr C Smith was now representing Mr Peters.

8.2.3. Appellant contacted Mr C Smith telephonically requesting him to withdraw his instructions to evict Mrs Mogane by virtue of the Notice of Review that had been previously served and filed; and

8.2,4. The Appellant did not, during the course of this telephonic conversation informs Mr C Smith of his intention to launch an

application to stay the eviction order.

8.3. The Appellant was served with a Notice of Appointment as Mr Peters' Attorney of record by Mr C Smith on the early afternoon of the 1st December 2006 whilst he was still drafting the application for the staying of the eviction order.

8.4. the Appellant did not serve a copy of the said application on Mr C Smith prior to the hearing of the said application.

8.5. The Appellant launched the said application on the afternoon of the 1st of December 2006 on an ex parte basis.

[9] According to his written representations to the Respondents the Appellant submitted that he was under no obligation to serve Mr Smith because the latter was not an attorney of record but that David Van Shalkwyk was. It is incomprehensible how such a submission could be made in the light of the conversation between Appellant and Mr C Smith and the notice of Appointment served on Appellant on the same afternoon the application was launched.

[10] The Respondents rejected, correctly in my view, that Mr C Smith was not an attorney of record at the time.

[11] The Respondents further rejected Appellant's attempt to rely on the provisions of Rule 55(9) of the Magistrate's Court. Appellant stated in his submission to Respondents that he made a judgment call in his client's interests not to bring the application on notice.

[12] I find that the judgment call by the Appellant was wrongly made because as the record shows he did not even disclose to the

Magistrate that he had omitted to serve his colleague (opponent) with papers despite his most recent communication with him. It is quite clear that he would have been hard pressed to furnish cogent reasons to the court for such an omission.

[13] It is appropriate to refer to an authority on which the Respondents relied when they referred to the 6th edition of Morris- Technique in Litigation;

'Attorneys .. Have duties towards the judiciary to ensure the efficient and fair administering of justice [per De Villiers JP in;

Cape Law Society vs Voster-1949(3) SA 421(C) % 425 & Van Den Berg vs General Council of the Bar of South Africa-2007(2) All SA499 (SCA) @ paras. 14 to 18].

It is suggested that the duty applies primarily, but not exclusively, in ex parte applications or in those matters where the party affected by the relief which is being sought is not yet before the Court. In opposed or defended matters the duty might be stated as a duty not to actively mislead the court [Van Den Berg vs General Council of the Bar of South Africa-2007(2) All SA 499 (SCA) @ paras. 14 to 18].

It would probably, almost certainly, not be held to require the disclosure of weaknesses in one's case, but might cover the suppression of fact, unknown to the other side, which would completely disentitle the client to the relief claimed."

[14] Further support for the view that Appellant's actions were inappropriate is to be found in Legal Ethics by Lewis (1982) page 123 "Repetitively, as all aspects of practice unfold, the practitioner finds an insistence on fair dealing and good faith

whether in his relationship with his client, his adversary, or any other. Integrity has been emphasised as a required 'fundamental

quality " of all who would practice law, its lack being castigated as destructive both of the lawyer's value to his client

and of his professional reputation.....

The warning to attorneys is that their profession give unusual scope for the exercise of the unfair, of sharp practice and even knavery... .That being so, especial effort must be made by every practitioner to ensure that all his dealings are honourable".

[15] It is quite clear that Appellant ought to have given Mr Smith notice for the many reasons have been advanced and that his failure to do so does constitute unprofessional conduct.

[16] Further, what I find regrettable is the attitude of the Appellant who even at the end of the proceedings fails to show any remorse regarding his actions. He instead attacks the Fourth Respondent.

16.1. Inter alia counsel for the Appellant submits that "the finding of the committee amounted to unethical and grossly irregular review of court proceedings. Such is the power that the disciplinary committee of the Fourth Respondent did not have".Appellant makes other disparaging remarks of and concerning the Fourth Respondent which do not bear repeating herein.

16.2. Appellant goes on to cite the Minister of Justice and Constitutional Development, Black Lawyers Association and the Law Society of South Africa as the Fifth, Sixth and Seventh Respondents. There is absolutely no justification for citing these parties who were not parties in the disciplinary action.

16.3. The remarks of Malan J.A in the case of Law Society of the Northern Provinces v Sonntag 2012(1) SA 372 para 17 are appropriate to cite in this matter. He commentsas follows:

"There are also other misdirections to which I will refer..... These remarks were echoed in Law Society of the Northern Provinces v Mogami and Other 2010(1) SA 186 SCA para 26:

"Very serious, however, is the respondent's dishonest conduct of the proceedings. Instead of dealing with the issues they launched an unbridled attack on the appellant. It has become a common occurrence for persons accused of wrongdoing, instead of confronting the allegation, to accuse the accuser and seek to break down the institution involved. This judgment must serve as a warning to legal practitioners that courts cannot countenance this strategy. In itself it is unprofessional".

I agree.

[17] The Appellant submits that the costs order was wrongly imposed on him. The matter was supposed to proceed on 12 November 2009 and the Respondents found that Appellant should not be responsible for the wasted costs incurred by the Respondents on that occasion.

[18] Concerning the subsequent costs order and considering the failure to paginate documents for the hearing of 27 January 2010 and the resultant further hearings on 8 and 9 March 2010 I find no fault in the costs being awarded against the Appellant.

[19] Regarding the sanction ordered against Appellant he submits that it was harsh. Appellant was ordered to pay a fine of R15 000 half of which was conditionally suspended for a period of three years.

[20] The Appellant argues that having been found guilty of the least of five charges, he should have been treated with more leniency.

20.1. The fact is, the profession of an attorney is an honourable and respected one and to be held in the utmost esteem. It is an

indispensible adjunct to every one, not only in law suits, but in many other private affairs and his office is deemed both necessary

and praiseworthy See Van Zyl: The Judicial Practice of South Africa Volume 1 at p41

20.2. Any deviation therefore from conduct considered appropriate for this high calling ought to be visited with the necessary opprobrium.

20.3. Any sanction, therefore below the effective fine of R7 500 would be seen by all concerned as a slap in the wrist and not expressing

sufficiently the disapproval which should accompany such conduct.

20.4. In terms of Section 58 of the Attorneys Act, the objects of the Society as the *custos morum* are inter alia to maintain and advance the prestige, status and dignity of the profession, to uphold and improve the standards of professional conduct and qualifications of practitioners and to provide for the effective control of the professional conduct of the practitioners.

20.5. I am of the view that the Respondents took into account the Appellants circumstances when they suspended half of the R15 000

fine. I accept that the Respondents blended the sanction with an element of mercy by taking into account that Appellant had only been in practice for one year at the time of the commission of the offence.

[21] In the result I propose that the following order be made:

The appeal is dismissed with costs.

I agree

S.A.M. Baqwa

Acting Judge of the High Court

I agree, it is so ordered.

H.J Fabricius Judge of the High Court

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