THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 446/2007

MARTIN GERHARD BOTHA Appellant

and

THE LAW SOCIETY OF THE NORTHERN PROVINCES Respondent

Neutral citation: *Botha v Law Society, Northern Provinces* (446/2007) [2008] ZASCA 106 (23 September 2008)

Coram: FARLAM, CLOETE, HEHER, PONNAN *et* CACHALIA JJA

Heard: 4 SEPTEMBER 2008
Delivered: 23 SEPTEMBER 2008

Summary: **Attorney**: unfit to continue to practise; suspension or striking off the roll; if the court a quo misdirected itself, facts subsequent to its decision may be taken into account on appeal. **Costs**: costs of proceedings in court a quo and on appeal where suspension substituted for striking off.

ORDER

On appeal from: High Court, Pretoria (R D Claassen and Mavundla JJ sitting as court of first instance).

The following order is made:

(1) The appeal is upheld.

(2) The order of the court below striking the appellant's name off the roll of attorneys is set aside, and the following order substituted:

'(a) The appellant is suspended from practising as an attorney for one year.

(b) The suspension referred to in (a) above is suspended for three years with effect from 23 September 2008 on condition: (i) that the appellant is not found guilty of a contravention of any of rules 68, 69 and 70 of the rules of the respondent committed during the period of suspension; and (ii) that the appellant is not found guilty of unprofessional conduct in terms of rule 89 of the rules of the respondent committed during the period of suspension.'

JUDGMENT

CLOETE JA (FARLAM, HEHER, PONNAN and CACHALIA JJA concurring):

[1] On 14 September 2004 the Pretoria High Court (Rabie J) granted an interim order as a matter of urgency at the suit of the respondent and with the consent of the appellant preventing the appellant from practising as an attorney for his own account and appointing a curator bonis to administer and control his trust account. On 28 February 2006 the court a quo (R D Claassen and Mavundla JJ) struck the appellant's name from the roll of attorneys, but subsequently granted him leave to appeal to this court.

[2] Section 22(1)(d) of the Attorneys Act 53 of 1979 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 practises . . . if he, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney.'

As was said in *Jasat v Natal Law Society*[1] and repeated most recently in *Malan v The Law Society of the Northern Provinces*,[2] the section contemplates a three-stage inquiry:

First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual inquiry.

Second, the court must consider whether the person concerned 'in the discretion of the court' is not a fit and proper person to continue to practise. This involves a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, is a value judgment.

Third, the court must inquire whether in all the circumstances the attorney is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice.

[3] The appeal was directed at the sanction imposed by the court a quo. The decision whether an attorney who has been found unfit to practise as such should be struck off or suspended is a matter for the discretion of the court of first instance. That discretion is an example of a 'narrow' discretion.[3] The consequence is that an appeal court will not decide the matter afresh and substitute its decision for that of the court of first instance; it will do so only where the court of first instance did not exercise its discretion judicially, which can be done by showing that the court of first instance exercised the power conferred on it capriciously or upon a wrong principle, or did not bring its unbiased judgment to bear on the question or did not act for substantial

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[1] 2000 (3) SA 44 (SCA) para 10.
[2] [2008] ZASCA 90 para 4.
[3] *Giddey NO v J C Barnard & Partners* 2007 (5) SA 525 (CC) para 19 and n 17.

reasons, or materially misdirected itself in fact or in law.[4] It must be emphasised that dishonesty is not a sine qua non for striking off. As Harms JA said in *Malan*:[5]

'Obviously, if a court finds dishonesty, the circumstances must be exceptional before a court will order a suspension instead of a removal . . . . Where dishonesty has not been established the position is . . . that a court has to exercise a discretion within the parameters of the facts of the case without any preordained limitations.'

[4] It is necessary to examine the facts in a little detail. Before I do so and in view of some of the submissions made on behalf of the respondent, I wish to point out that an applicant law society is entitled to apply for a respondent attorney to be called for cross-examination under Uniform Rule 6(5)(g). That right may usefully be invoked where the facts alleged in the attorney's answering affidavit fall peculiarly within such attorney's knowledge and suspicion attaches to their veracity. (A court could also call for oral evidence *mero motu*: whatever the position may be in relation to other types of application,[6] in matters such as the present the court is exercising its supervisory function over legal practitioners and is entitled to call for evidence to enable it properly to do so.) If the attorney is not cross-examined then, unless the allegations and denials made in the answering affidavit are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers, the case must be decided on the common cause facts and, where there is a conflict, on the attorney's version.[7] Speculation as to what might really have happened is not permissible.

[5] There were four complaints made to the respondent about the appellant's

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[4] *A v Law Society of the Cape of Good Hope* 1989 (1) SA 849 (A) at 851A-F; *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) at 537D-G; *Jasat*, above n 1, loc cit; *Malan*, above n 2, para 13; and cf *Kekana v Society of Advocates of SA* 1998 (4) SA 649 (SCA) at 654B-H.

[5] Above n 2, para 10.

[6] A question not yet decided by this court: *Minister of Land Affairs and Agriculture v B & F Wevell Trust* 2008 (2) SA 184 (SCA) para 60; *Miloc Financial Solutions (Pty) Ltd v Logistic Technologies (Pty) Ltd* 2008 (4) SA 325 (SCA) para 53.

[7] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

conduct. Two ─ by Mr Biyela and attorney Deon de Klerk ─ prompted the respondent to appoint Mr A T van Rooyen, a management consultant and forensic investigator, to investigate the appellant's practice.

[6] Mr Biyela wanted to sell a property to Mr Mangwane, whom the appellant had previously represented professionally. The appellant drew up the sale agreement and because he was not a conveyancer, he undertook with the consent of both parties to arrange with attorney De Klerk for the property to be transferred into Mr Mangwane's name. The latter paid R40 000, the first instalment of the purchase price, to the appellant in about September 2004. The payment was made in cash and the appellant says that he decided to take it home and put it in his safe as he had no safe at his office (shared with five other attorneys, all practising for their own account) and the banks were already closed. On the way home he attended a function with colleagues. He later discovered that the money, which he had been carrying on him, was gone. He decided to replace the money from his own income. A further instalment of R25 000 was paid to him by Mr Mangwane in November and a final instalment of R25 000 in December. He kept these amounts in his safe at his home. He issued no receipts at any time. He says that he contacted Mr Biyela and told him of his predicament after he had received the first R25 000 and this allegation was not challenged in the replying affidavit. He thereafter made payments of R10 000 (on a date unspecified), R20 000 on 1 February, R16 000 on 2 February, R28 000 on 24 May, R12 000 on 3 June and a final payment of R4 000 on 6 June 2005.

[7] There is no explanation why the two amounts of R25 000 were not paid over to Mr Biyela immediately they were received. However, the appellant annexed to his answering affidavit a copy of a letter dated 25 August 2005 sent by Mr Biyela to the respondent in which he withdrew his complaint and confirmed that the full amount had been paid over to him; and the appellant also said that in August 2005 he paid to Mr Biyela interest calculated by the latter's bank in an amount of R5 500. Again, this allegation was not challenged in the

replying affidavit.

[8] In the meantime Mr Mangwane had, in about October 2004, paid an amount of R2 000 to the appellant for the transfer costs of the property that he had bought from Mr Biyela. That amount comprised the fee the appellant had agreed with attorney De Klerk plus disbursements. Transfer took place on 26 October 2004. In March 2005 attorney De Klerk lodged a complaint with the respondent that he had not been paid the agreed transfer fee and costs. The appellant's explanation was that he had transferred R1 700 to attorney De Klerk's bank account on 14 October 2004; that he had paid the remainder of the amount outstanding early the following year together with other amounts that he owed attorney De Klerk; and that the payments must have been wrongly attributed in attorney De Klerk's books. The appellant annexed to his answering affidavit a letter from attorney De Klerk dated 8 August 2005 in which the latter withdrew his complaint against the appellant and confirmed that the full amount owing in respect of the Biyela/Mangwane transaction had been paid to him.

[9] The appellant told Mr van Rooyen that he had not received a letter of 30 March 2005 sent to him by the respondent requesting a response to attorney De Klerk's complaint and in his answering affidavit he said that he had no recollection of receiving such a letter but if he had, he would have responded to it as he had done to the complaint by Mrs van Wyk (referred to below). There is no basis upon which this explanation can be rejected particularly because there is no proof that the letter, which was apparently sent by ordinary post, was ever delivered at his office.

[10] The appellant did not fully cooperate with Mr van Rooyen. The criticism by the appellant of Mr van Rooyen and the contents of his report is misplaced and unfortunate in tone and content. It was the appellant's obligation to co-operate in the investigation[8] and it does not lie in his mouth to aver that the

[8] *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 853G-H.

report was deficient where his co-operation would have allowed the full picture to emerge. It is not necessary to go into detail; it suffices to say that the appellant did not react to numerous messages left on his cellular telephone by Mr van Rooyen and that he did not provide documents to the latter when he should have. He did, however, make a full and frank disclosure of what had happened to the R40 000, and the fact that neither of the two amounts of R25 000 had been paid into his trust account or was reflected in his books of account.

[11] The investigation by Mr van Rooyen led him to the conclusion that the appellant had contravened the following provisions of the Act and rules made thereunder: s 78(1) of the Act, in that not all monies received by the appellant were deposited into his trust account; ss 78(4) and (6) of the Act, read with rules 68.1 and 68.2, in that the appellant's accounting records did not reflect all transactions of the practice; rule 68.5 in that the accounting records were not up to date; rule 68.7 in that the appellant did not account to Mr Biyela within a reasonable time; rule 68.8 in that amounts were not paid over to clients within a reasonable time; rule 68.9 in that payment to other practitioners was not made within a reasonable time; rule 69.1 in that trust money was not promptly deposited; rule 89.5, in that there was a failure to reflect all financial transactions in the books of account of the practice; and rule 89.7 in that the payment of trust money to clients after due demand was delayed without lawful excuse.

[12] In his answering affidavit the appellant pointed to the predicament in which he had found himself after the R40 000 had gone missing. He said that with the exception of the payments in respect of the Biyela/Mangwane transaction, all amounts paid to him in trust had been deposited into his trust account, although he explained that (with a few exceptions) he conducted a criminal practice at the magistrates' courts and received no money in trust for his services. He further explained that he was without exception paid at the conclusion of each criminal trial, in many cases from the repayment of bail

money, and usually deposited those payments directly into his business account. The appellant also admitted that he had not timeously submitted audit reports required by Rule 70 for two years, 2003 and 2004, although he pointed out that unqualified certificates had subsequently been issued to him for those years and for 2005.

[13] The remaining two complaints received by the respondent, from Mrs van Wyk and attorneys De Abreu & Cohen Inc, can be dealt with more briefly. Mrs van Wyk complained that the respondent had not given proper attention to her instructions to appeal against the refusal of the South African Police Services to grant her a firearm licence. The appellant's explanation was that he was waiting for the record, which he had requested from the South African Police Services, and the delay was due to their failure to provide it; Mrs van Wyk's attitude was that he had not acted sufficiently pro-actively. She terminated his instructions. He did not give her a receipt for her payment of R1 000. He refunded this amount to her together with a further amount of R1 500 in respect of her travelling costs. The complaint of attorney Cohen of the firm De Abreu & Cohen Inc, was that the appellant did not reply to their letters of 24 April, 28 May and 1 June 2004 proposing a settlement between their respective clients who were engaged in civil litigation. The appellant admitted that he had not done so but pointed out that the matter had subsequently been settled and that the complaint against him, withdrawn. The charge that he had failed to attend a disciplinary hearing in respect of the Van Wyk and De Abreu Cohen complaints when summoned by the respondent, was conclusively refuted in his answering affidavit: he did attend but the hearing did not proceed.

[14] In the course of its judgment the court a quo said:

'In Respondent se hele relaas en verontskuldigende bewerings is daar nie een enkele woord van verskoning nie. Hy maak 'n gebrek om trustgelde in te betaal op 'n trustrekening, of dadelik uit te betaal (soos die laaste twee paaiement in die Biyela-aangeleentheid) af as 'n nietigheid. Sy houding is dat omdat niemand sogenaamd skade gely het nie, die siviele litigasie wel geskik is, en De Klerk wel betaal is, en Van

Wyk se fooie terugbetaal is, het hy nie onprofessioneel ensovoorts opgetree nie.
Die groot probleem myns insiens in Respondent se hele antwoord en verweer is dat hy hoegenaamd geen insig toon in dit waaroor dit hier gaan nie.'

[15] The court a quo materially misdirected itself on the facts. The appellant did not deny that he had been guilty of any unprofessional conduct. His attitude was:

'Alhoewel ek wel nie aan alle bepalings van toepassing op my praktyk en werksaamhede as prokureur van hierdie Agbare Hof voldoen het nie, ontken ek dat ek sodanig onprofessioneel, oneerbaar of onbetaamlik opgetree het wat hierdie Agbare Hof sou noop om my van die rol van prokureurs te skrap.'

Of course he put facts before the court which placed the offences which he had committed in a less serious light. There is nothing wrong with that. But he did not attempt to exculpate himself, as the court a quo found. Indeed, he remarked, with justification, that when questioned by Van Rooyen:

'[E]k geen doekies omgedraai het nie en het met die hele sak patats vorendag gekom en onmiddellik toe ten spyte van my eie nadeel en verleentheid aan Van Rooyen die volle ware verhaal vertel; en ek het nooit enigsins gepoog om 'n verskoning te gebruik of om nie die volle verhaal, hoe inkriminerend ook al teenoor myself, te openbaar nie.'

Nor did he dismiss as insignificant his failure to pay trust monies into his trust account, or make payments out of it, as the court a quo said. This finding was without factual foundation. It is true that the appellant did not apologise, but that in my view is all together too tenuous a basis for finding that he has no insight into the potential prejudice or harm that his conduct may have caused clients, other attorneys or the public at large. He said, in connection with the loss of the R40 000:

'Ek het oor die volgende paar dae besluit, verkeerdelik, om stil te bly oor die voorval en die geld wat ek verloor het te vervang uit my eie inkomste aangesien ek verkeerdelik geglo het ek sou uiters verneder en belaglik vertoon het as ek die gebeure openbaar het.'

And he also said:

'Indien hierdie Agbare Hof gelas dat my bevoegdhede as prokureur van hierdie Agbare Hof vir 'n verdere tydperk gereguleer moet word soos tans die geval is, sal die gevolge

daarvan voldoende wees om my nie net tereg te wys nie, maar ook effektiewelik te straf vir die situasie wat ek oor myself gehaal het ten aansien van die Biyela aangeleentheid.'

[16] In view of the misdirections of the court a quo, this court is at large to impose the sanction it considers appropriate. Given that it will impose a sanction as if none had previously been imposed, I see no reason why it should not take into account the common cause fact that the appellant has, since the interim order granted by the Pretoria High Court three years ago, been practising as an attorney in the employ and under the supervision of attorney Jannus Vermaak.[9] There has been no suggestion that he has not conducted himself properly during that period. If these facts are taken into account, as I believe they should be, then I am satisfied for the reasons which follow that the appellant will by now have been rehabilitated; that the conduct which led to the finding of the court a quo that the appellant was unfit to practise as an attorney, is unlikely to be repeated; and that neither an order striking the appellant off the roll, nor an order suspending him from practice, is necessary, either in the interests of the public or to punish him. Of these two considerations the former is the more important, although the latter must also be taken into account[10] and I shall examine each in turn.

[17] So far as the interests of the public are concerned, I concurred in the judgment given in *Malan*[11] in which it was said that even in cases not involving dishonesty, a conservative approach should be followed in order to stem an erosion of professional ethical values. But it remains an important fact that no dishonesty on the part of the appellant was alleged, much less established. The concatenation of circumstances which gave rise to the problem surrounding the Biyela matter is not likely to recur. Once the appellant decided to keep quiet

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[9] Cf *S v Barnard* 2004 (1) SACR 191 (SCA) paras 19 to 21 and p 197h-i.
[10] *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA) para 7; *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA) para 19; *Law Society of the Cape of Good Hope v Peter* [2006] ZASCA 37.
[11] Above n 2, para 11.

about the loss of the R40 000 and to cover his tracks, he inevitably made himself guilty of the raft of contraventions catalogued by Mr van Rooyen. Absent the cause, the effect would not have followed. The three years the appellant has practised under supervision would in my view be sufficient to make him realise the error of his ways. I do nevertheless consider that, bearing in mind that the appellant has not been practising for his own account for the last three years, a suspension from practice for one year, which suspension is itself suspended on appropriate conditions for three years, would be desirable in the interests of the public to make assurance doubly sure.[12] The conditions of suspension will relate to the rules of the respondent which the appellant contravened ie those that deal with payments to other practitioners within a reasonable time (rule 68), regular and prompt deposits into, and payments out of trust accounts (rule 69), reports by accountants in regard to the books of the practice (rule 70) and unprofessional, dishonourable or unworthy conduct (rule 89).

[18] So far as the punishment aspect is concerned, there was no actual prejudice to any of the appellant's clients of any real significance. Mr Biyela was paid the full amount due to him, together with interest; attorney De Klerk was paid in full; Mrs van Wyk's appeal was not compromised as it had already been noted when she retained the appellant; and the De Abreu & Cohen matter was ultimately settled. On the other hand, the consequences for the appellant were severe. In consequence of the interim order made he worked for another attorney and earned a monthly salary. The difference between that salary and what he previously earned was about R7 000 per month, which means that he has lost income of over a quarter of a million rand over the last three years; and the amount of R40 000 paid to Mr Biyela plus the interest must be added to that amount, as also the costs of the application in the court a quo (on the attorney and client scale) and his own costs of appeal, for reasons that I shall give presently. I therefore consider that he has been sufficiently punished for what

[12] Cf *Law Society of the Cape of Good Hope v Peter*, above n 10, paras 22 and 23.

he did.

[19] That brings me to the question of costs. Both sides asked for costs in this court and in the court a quo and in the case of the respondent, that those costs be awarded on the scale as between attorney and client.

[20] I shall deal first with the costs in the court a quo. The respondent was obliged to approach the court to obtain the order which this court has held was appropriate. The respondent is not an ordinary litigant and in bringing proceedings of this nature, it performs a public duty.[13] In the circumstances the order of the court a quo directing the appellant to pay the respondent's costs on the scale as between attorney and client should remain.

[21] I have found only three reported cases where the sanction imposed by the court a quo has been reduced on appeal from striking off to suspension. All were before this court. In two,[14] the question of the costs of appeal was not discussed ─ the law society concerned was simply ordered to pay the costs of appeal; and in the third,[15] where very special circumstances were present prompting this court to remark that the variation of the order was largely one of form rather than substance, no order was made in regard to the costs of appeal. In the present matter, the appellant has obtained substantial success on appeal ─ although, it must be emphasised, not against the respondent, which continued to act as it had in the court below as the statutory *custos morum* of the attorneys' profession in the Northern Provinces. The approach it should adopt on appeal was set out by Beadle CJ in a Rhodesian case,[16] in a passage subsequently approved by this court,[17] as follows:

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[13] *Incorporated Law Society of Natal v Hillier* (1913) 34 NLR 237 at 250-1; *Incorporated Law Society v Taute* 1931 TPD 12 at 17; *Solomon v Law Society of the Cape of Good Hope* 1934 AD 401 at 408-9.
[14] *Law Society of the Cape of Good Hope v C* 1986 (1) SA 616 (A) at 641H; *Summerley v Law Society, Northern Provinces*, above n 10 at 623D.
[15] *A v Law Society of the Cape of Good Hope*, above n 3 at 853A-F.
[16] *Pitluk v Law Society of Rhodesia* 1975 (2) SA 21 (RA) at 30B-D.
[17] *A v Law Society of the Cape of Good Hope*, above n 3 at 853B-C.

'To what extent the Law Society should press for the penalty which it considers appropriate must, of course, depend on the circumstances of each particular case. If the decision of the Court *a quo* is taken on appeal, however, I consider the function of the Law Society is to oppose an appeal with all the vigour with which the State would oppose an appeal in a criminal case where there was an appeal against the sentence of the High Court, which sentence the State considers to be an appropriate one.'

[22] I accordingly do not consider it appropriate to order the respondent to pay the appellant's costs of appeal. There is much to be said for the argument on behalf of the respondent that its members, who fund it, should not have to pay for its costs of appeal either. I nevertheless prefer to follow the approach of Tindall J (Solomon J concurring) in *Incorporated Law Society v Taute*[18] where it was held that where a law society fails to prove charges against an attorney and the society's conduct is not open to criticism, the correct order is no order as to costs. On a parity of reasoning, where a law society fails on appeal to justify the order made for which it contended in the court of first instance and the sanction imposed on the attorney is reduced in severity, the same order would be appropriate.

[23] The following order is made:

(1) The appeal is upheld.

(2) The order of the court below striking the appellant's name off the roll of attorneys is set aside and the following order substituted:

'(a) The appellant is suspended from practising as an attorney for one year.

(b) The suspension referred to in (a) above is suspended for three years with effect from 23 September 2008 on condition: (i) that the appellant is not found guilty of a contravention of any of rules 68, 69 and 70 of the rules of the respondent committed during the period of suspension; and (ii) that the

[18] Above n 13, loc cit.

appellant is not found guilty of unprofessional, dishonourable or unworthy conduct in terms of rule 89 of the rules of the respondent committed during the period of suspension.'

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T D CLOETE
JUDGE OF APPEAL

Appearances:

For Appellant: J C Klopper

Instructed by
Pieterse & Curlewis Inc Pretoria
Lovius-Block Bloemfontein

For Respondent: A T Lamey (Attorney)

Rooth & Wessels Inc Pretoria
Naudes Inc Bloemfontein