THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 588/08

THE LAW SOCIETY OF THE NORTHERN PROVINCES	Appellant
and	
TSHEGOFATSO CHRISTOPHER MOGAMI	First Respondent
NICLAS MODISE DITSHIPI MABUSE	Second Respondent
THE LAW SOCIETY OF BOPHUTHATSWANA	Third Respondent

Neutral citation: *Law Society of the Northern Provinces v Mogami* (588/08) [2009] ZASCA 107 (22 SEPTEMBER 2009)

Coram: HARMS DP, MTHIYANE, HEHER, MLAMBO AND MAYA JJA

Heard: 03 SEPTEMBER 2009

Delivered: 22 SEPTEMBER 2009

Updated:

Summary: Attorneys; disciplinary proceedings

ORDER

On appeal from: High Court of South Africa (BPD) GURA J AND MONAMA AJ as court of first instance.

(a) The appeal is upheld with costs on the attorney and client scale.

(b) The order of the full bench is set aside.

(c) In its stead the following order issues against the respondents, Mr Mogami and Mr Mabuse:

i. They are reprimanded for their unlawful, unprofessional and unethical conduct.

ii. They are ordered to account properly to the complainants Motshephe, Mashilo and Buda within two months of this judgment, and to supply the applicant with a report on the accounting supported by vouchers.

iii. They are ordered to comply with the provisions of sections 55 and 84A of the Attorneys Act and recognise the applicant's jurisdiction.

iv. They are to pay, jointly and severally, the costs of the applicant on an attorney and client scale, including the reasonable costs of the inspection of the accounting records of the respondents; the reasonable costs of the curator; and the reasonable fees and expenses of any person consulted or engaged by the curator.

JUDGMENT

HARMS DP (MTHIYANE, HEHER, MLAMBO AND MAYA JJA concurring)

INTRODUCTION

[1] The appellant, the Law Society of the Northern Provinces (incorporated as the Law Society of Transvaal), launched an application against two attorneys, Mr TC Mogami and Mr NMD Mabuse, in the Bophuthatswana High Court. The application was in two parts. Part A was for an interim order suspending them from practice as attorneys pending the final determination of part B, and for ancillary relief. Part B was for an order striking them from the roll of attorneys, and for costs.

[2] The relief sought in part A of the notice of motion was granted by Hendricks J, but the full bench (Monama AJ in a judgment concurred in by Gura J), when dealing with part B, refused to take any punitive action against the respondents; permitted them to recommence their practice; and ordered the parties to pay their own costs. The appeal is against this judgment. As a result of the interim order the respondents were effectively suspended from practising for a period of about ten months.

[3] Although the full bench was able to deliver judgment on the merits within six weeks the application for leave to appeal was handled differently. The application was filed on 15 November 2007; the matter was heard only on 14 March 2008, and it took nearly seven months to deliver on 3 October 2008 a one page judgment granting leave. It is inexplicable why such an uncomplicated judgment took so long to deliver especially in a case such as this which not only affects the parties but where a public interest element is involved (*New Clicks SA (Pty) Ltd v Tshabalala-Msimang NO; Pharmaceutical Society of SA v Minister of Health* [2005] 1 All SA 326, 2005 (3) SA 238 (SCA) at para 36-38). Courts are obliged to deal with applications for leave expeditiously and systems ought to be in place enabling courts to hear them soon after having been filed. There is also no reason why they cannot be disposed of in chambers without oral argument.

[4] Applications for the suspension or removal from the roll require a three-stage enquiry. First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual inquiry. Second, it

must consider whether the person concerned is 'in the discretion of the Court' 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. And third, the court must inquire whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice (*Jasat v Natal Law Society* 2000 (3) SA 44, [2000] 2 All SA 310 (SCA); *Malan and Another v Law Society of the Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216; [2009] 1 All SA 133 (SCA) at para 10)).

[5] The full bench found the respondents guilty of some offending conduct but either overlooked or failed to assess the evidence in regard to the other allegations properly. In spite of its finding of guilty it did not consider the second question squarely but moved immediately to the third, holding that the period of suspension due to the interim order was a sufficient penalty for their transgressions.

THE FIRST ENQUIRY: THE OFFENDING CONDUCT

[6] The respondents were admitted as attorneys of the Bophuthatswana High Court. They are members of the local law society, the Law Society of Bophuthatswana. It was joined as a respondent in the court below because of its possible interest in the matter and took part in some of the proceedings but chose not to be involved in the appeal.

[7] The Attorneys Act 53 of 1979 was amended during 1998 by the Attorneys and Matters Relating to Rules of Court Amendment Act 115 of 1998. In brief, the effect of the amendment was that for purposes of chapter 2 of the principal Act (the provisions dealing with the Fidelity Fund) attorneys practising within the former Bophuthatswana are deemed to be members of the appellant (s 55); and the appellant obtained concurrent jurisdiction with the Bophuthatswana society in relation to disciplinary matters (s 84A). The powers given to the appellant by s 84A include the jurisdiction to make rules as to conduct that constitutes unprofessional or dishonourable or unworthy conduct; to enquire into any case of alleged unprofessional or dishonourable or unworthy conduct; to apply for the suspension or striking off of an attorney on the ground that the attorney is not a fit and proper

person to continue to practise as an attorney; to prescribe the books, records, certificates or other documents to be kept and inspection thereof; and to direct any practitioner to produce for inspection any book, document, record or thing.

[8] Practitioners of Bophuthatswana and members of the Bophuthatswana society objected to the fact that the appellant was given these powers and refused to comply with the law as it stands. The society even instructed their members to ignore the law by refusing to recognise the appellant's powers and jurisdiction as conferred by the Act. The judgment in *Law Society, Northern Provinces (Inc as the Law Society of the Transvaal) v Maseka* 2005 (6) SA 372 (BH) is in this regard particularly important. It involved an application permitting the appellant to inspect the books of the then chair and acting administrator of the society. Judgment was delivered on 8 March 2005 and the court held that the appellant had the powers referred to in the preceding paragraph (at 378D-G). On 23 May the society resolved more or less to ignore the judgment, insisting that all disciplinary matters against its members should be dealt by it. Both this court and the Constitutional Court dismissed applications for leave to appeal, the latter on 4 October 2005. In spite of this the society made common cause with the respondents during May 2006 in rearguing the same point, namely that the appellant had no locus standi to (a) investigate complaints against the respondents; (b) require an inspection of the respondents' books; and (c) launch the present application.

[9] It went further. A council member of the Bophuthatswana society (Mr R V Matlhare) filed an affidavit on its behalf. In spite of the mentioned case law he denied the existence of the amending Act and made legal submissions that fly in the face of at least one judgment of this court. Hendricks J dismissed these points. He pointed out that this court had, previously, held that the argument presented was fallacious (*Mabaso v Law Society, Northern Provinces* 2004 (3) SA 453 (SCA) at para 10). In spite of this, the society and the respondents sought, again, to appeal the matter on the same grounds as had been disposed of in the *Maseka* case. The attempts failed.

[10] The affidavit of Mr Matlhare accused the appellant of misleading the court and fabricating evidence. The irrefutable facts are these.

(a) The respondents were obliged to file their annual auditor's report on 31 August 2005. They failed to do so. This is a contravention of the appellant's applicable rule 70. The purpose of the rule is to satisfy the appellant that an attorney's accounting records are kept in accordance with the Act and the rules, and that an attorney handles and administers trust money properly and responsibly. The respondents nevertheless denied this failure in their first affidavits while in the second set they admitted it but denied without any explanation that they were in breach of the rule.

(b) The appellant made an attempt to inspect the respondents' accounting records on 28 September 2005, but was refused access. As mentioned, the appellant has a statutory right to inspection.

(c) Last, their fidelity fund certificate for the year 2005 lapsed on 31 December 2005. They practised as from 1 January 2006 without any such certificate. This is in terms of s 41(1) and 83(10) of the Act a serious criminal offence (*Law Society of the Northern Provinces v Mamatho* 2003 (6) SA 467 (SCA)). On 20 March 2006, the appellant launched its urgent application, which was primarily based on these grounds.

[11] The respondents and the Bophuthatswana society not only denied that the respondents were practising without fidelity fund certificate but also affirmed that they had the necessary certificates. The point was eventually abandoned but there was never an explanation offered for the content of the affidavits. It is difficult to escape the conclusion that not only the respondents but also the Bophuthatswana society sought to mislead the court. It is bad enough for courts to deal with alleged unprofessional conduct of practitioners but it is a sad day for the legal profession in particular and justice in general if a professional body acts unprofessionally by ignoring the clear law and judgments of competent courts, and by presenting spurious evidence.

[12] Unsurprisingly, Hendricks J did not take kindly to the actions of both the respondents and the Bophuthatswana society. The full bench adopted a different approach. It did not address the unacceptable and dishonest way in which the litigation was conducted by both the respondents and the Bophuthatswana society

as if that were an irrelevant consideration. It is not (*Botha v Law Society of the Northern Provinces* [2009] ZASCA 13; 2009 (3) SA 329 (SCA) at para 18-20). Instead, the full bench issued a warning to both the appellant and the Bophuthatswana Society: they may not issue conflicting instructions to practitioners and they must co-govern. The court did not take into account that the Bophuthatswana society had issued an unlawful instruction nor did it consider that the appellant was exercising a statutory duty imposed on it by Parliament. A practitioner is not entitled to hide behind an unlawful instruction. The respondents, it may be noted, did not state that they were unaware of the case law set out above. The full bench's warning was, as far as the appellant is concerned, uncalled for and inappropriate.

[13] Although the full bench found that the respondents had contravened rule 70 (point (a) above), it did not take that fact into account when dealing with the rest of the inquiry. As to point (b), it found that in the light of the instruction of the Bophuthatswana society that the respondents' attitude had not been 'obstructionist in nature'. This misses the point. They ignored a legal demand without legal justification. The respondents are guilty of this transgression. As to (c), the full bench accepted that the respondents had been practising without a certificate. According to the judgment they had admitted that they were wrong in so doing. However, such an admission is not to be found in their affidavits. Counsel may have made the concession during the hearing but there is no apology or expression of regret or an attempted explanation in their papers.

[14] In addition to the foregoing the appellant drew the court's attention in the founding papers to a number of instances where, it was alleged, either respondent had contravened one or more rule in dealing with clients' matters. These cases all resulted from complaints laid by members of the public with the appellant. The complaints were mostly that the respondents had failed to account properly to their clients. The full bench dismissed all the complaints. On appeal the respondents' counsel was bound to concede that the respondents had in fact failed to account properly to some clients and that their accounting to the court in the papers was insufficient. He argued, however, that the fact that the respondents had failed to account properly was not a charge they had to meet because the complaint was a

failure to account and not one to account ‘properly’. I do not believe that the submission was seriously made. In what follows I deal with the individual complaints that were established.

[15] Mrs DS Motshephe: The respondents were instructed to collect the sum of R163 173,40 on behalf of Mrs Motshephe from a debtor. She laid a complaint that R53 350,00 only had been paid over to her. The respondents were able to show that they had paid a further sum of R33 000, which left about half the amount unaccounted for. Because the complainant had overstated the amount outstanding the full bench dismissed her complaint because, it said, she was not altogether honest in her complaint. The full bench also misread her evidence as to what was due to her and used that as another reason to dismiss the complaint.

[16] The main responsibility in this case was that of Mr Mabuse. The complainant sent a fax to the firm on 5 April 2005 requesting proper accounting. The firm did not respond and she proceeded to lay a complaint. On 27 July, the appellant sent the firm a letter ‘together with a bunch of documents’ (in the words of Mabuse) setting out her complaint and asked for a response. He refused to give one and returned the documents on 15 August. On 5 December he informed the Bophuthatswana society of the complaint. He mentioned that he refused to consult with the complainant because the matter had not been finalised, and that the file had been sent to a cost consultant for preparing the firm’s account. He undertook to prepare a final account and to issue a cheque for the outstanding amount. The application was launched on 20 March 2006 and the respondents deposed to their first answering affidavits on 31 March. Mabuse’s answer at the time was that he could not deal with the complaint because the file was still with the cost consultant. In addition, both he and the Bophuthatswana society falsely denied that the society had a rule requiring proper accounting

[17] In his second affidavit, sworn to on 11 May 2007, he denied for the first time having received the fax. This denial, in the light of the facts, cannot be true. He alleged also that he had paid more than the amounts mentioned but did not provide any proof. Instead he put the appellant to the proof that he did not. He also said that he was unable to respond because the file was attached pursuant to Hendricks J’s interim order. But that order only became effective during December 2006 when the

application for leave to appeal had been put to rest. His bald denial that he failed to pay trust funds over within a reasonable time is also not credible taking into account the common cause dates of receipt (30 August to 10 October) and payment of less than the full amount (18 December 2003).

[18] To conclude on this aspect: on the respondents' own version they have failed to account fully and the accounting on the papers is insufficient and incomplete. The firm knew at least since August 2005 that it had to account and it did not. There is no explanation why between 5 December 2005 and March 2006 the promised accounting and settlement of accounts did not take place or why, with the court order suspended, not before December. Even after the files were attached the respondents could have inspected them to prepare their answer. Also, the amounts do not add up. And they have no answer to the complaint that they failed to answer correspondence or delayed payment of trust funds. The full bench should in the light of these facts have concluded that Mabuse was guilty of three breaches: failure to account (rule 68.7); delaying the payment of trust money (rule 68.1); and the failure to answer correspondence (rule 89.23). The corresponding Bophuthatswana rules are 49(1), 51(2) and 76(22).

[19] Mr G Mashilo: As a result of a complaint by Mr G Mashilo, the appellant sought Mabuse's comments. He responded by letter of 13 October 2003. The appellant was dissatisfied with the response and decided to investigate whether he overcharged his client and failed to account within a reasonable time. Although properly notified, Mabuse failed to attend the hearing. His excuse is that he obeyed the Bophuthatswana society. I have already indicated that the excuse is not valid and that Mabuse is accordingly guilty of a contravention of Bophuthatswana rule 76(24).

[20] A further problem is that the statement of account provided in the papers cannot be reconciled with Mabuse's evidence. The firm received R 55 039,50 on behalf of Mashilo from the RAF. Mashilo was allegedly paid R28 500,00 by means of loans (R 16 000) and capital (R12 500). According to one statement the fees and disbursements consisted of the balance, R26 539,00. However, if Mabuse's evidence is read with the detailed statement of account the fees and disbursements amounted to R39 000. The inconsistency is not explained and the accounting is

accordingly not a proper accounting. In addition, there is no proof of payment of R12 500 of the capital amount which the respondents admit was due to the complainant. It follows that the court should have found Mabuse guilty of failing to account properly.

[21] Mr JO Buda: The complaint of Mr Buda concerns Mogami. The complaint is that Mogami failed to account properly to Buda. The full bench did not consider this complaint, finding that the firm did keep Buda informed of the status of the matter. The issue is fairly simple. The statement of account on which Mogami relies is with the common cause evidence not a proper detailed statement of account. It lacks detail with reference to dates and calculations of interest and of fees and disbursements and it does not reflect payments for fees made. Although not serious in itself, the fact remains that Mogami transgressed the mentioned rule.

[22] Ms MJ Molefe and Mrs Kunene: The complaint of Mrs Molefe also relates to Mogami. The complainant's minor niece was involved in an accident and the mother instructed the firm to handle her claim against the RAF. The mother died and the complainant took her sister's children under her care. The RAF paid the claim and the firm paid the money into the Guardian's Fund. Ms Molefe tried to establish where the money was but Mogami did not deign to inform her. He has many justifications and although on his version he may not have breached any written rule of ethics I believe that the application of the basic principles of ubuntu placed an ethical duty on him to respond to her queries. Mrs Kunene's complaint against Mabuse is not much different and my remarks apply to that instance as well.

[23] It is clear from this exposition of the complaints that were lodged with the appellant that the full bench failed to assess the facts properly and that its assumption that the respondents were not guilty of unprofessional, dishonourable or unworthy conduct cannot be justified. There were further complaints levelled against them but these cannot be decided on the papers. The appellant submitted that in these circumstances we should refer those disputed for oral evidence. We cannot comply with the request. An application for the hearing of oral evidence must, as a rule, be made in limine and not once it becomes clear that the applicant is failing to convince the court on the papers or on appeal. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the

matter to be referred to evidence should the main argument fail (*De Reszke v Maras* [2005] 4 All SA 440, 2006 1 SA 401 (C) at para 32-33). In a case such as this a Law Society might be able to apply in part A of its application for an order ordering the respondent to appear before its council for an oral enquiry.

THE SECOND ENQUIRY: ARE THE RESPONDENTS FIT AND PROPER

PERSONS TO CONTINUE PRACTISING?

[24] It has been mentioned that the full bench did not address this issue, at least not explicitly. To the extent that it may by implication have exercised a discretion or value judgment we are nevertheless free to exercise our own because its discretion was based on an incorrect assessment of the facts.

[25] I have with reservations concluded that the respondents are not unfit to continue practising as attorneys. The particular complaints dealt with indicate a level either of incompetence, inattention or inability to do professional work but the seriousness is not such as to disqualify them from practising. More serious were the failure to submit their auditor's report and the fact that they practised without fidelity fund certificates. These matters were soon rectified – even before part A was heard by Hendricks J. Although the respondents did not offer any explanation or excuse for their transgressions I will give them the benefit of the doubt and accept that these were isolated lapses and that it would appear that it is unlikely that they will be repeated.

[26] Very serious, however, is the respondents' 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 a 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. The problem is that the respondents' professional body appears to have instigated their behaviour and aided and abetted them in making untruthful denials, ignoring laws and court judgments, and launching an attack on the appellant. Had it not been for the invidious role of their society I would have had little hesitation to find that the respondents were not fit to continue practising.

THE SANCTION

[27] The finding that the respondents are guilty of unprofessional conduct but that they are fit to continue to practise does not mean that it is the end of the inquiry. We are entitled to discipline them by suspending them from practice with or without conditions or by reprimanding them (*Malan and Another v Law Society of the Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216; [2009] 1 All SA 133 (SCA) para 5).

[28] An appropriate sanction would have been a suspension from practice for a substantial period. As mentioned, the respondents were effectively suspended from practice for ten months under the order of Hendricks J. It is now two years since the suspension lapsed. To impose another period of suspension at this late stage appears to me to be futile.

[29] In my view a serious reprimand is called for. But that will not suffice. We were repeatedly told by the respondents' counsel that as long as the two sections of the Act remain in place the problem between Bophuthatswana practitioners and the appellant will recur. In addition, the accounting problems in the cases mentioned will not have been solved. The reprimand must, accordingly, be accompanied by an order requiring the respondents to account properly to those clients and to report to the appellant. It should also be ordered that the respondents comply with the appellant's demands under chapter 2 of the Act as well as s 84A.

[30] I also believe that it is appropriate to reprimand the Bophuthatswana society. It is a party before us although it chose not to appear. In the exercise of our inherent jurisdiction such a reprimand is justified. The Bophuthatswana society must comply with the law and it must respect the appellant's statutory jurisdiction. The filing of dishonest affidavits cannot be countenanced. The responsible members of its executive run the risk of disciplinary proceedings in the event of a repetition.

COSTS

[31] As mentioned, the full bench, in spite of its findings that the respondents had failed to file an auditor's report and had practised without a fidelity fund certificate, ordered the parties to pay their own costs. This is an unusual order. The appellant

had a statutory duty to approach the court. It did not do so as an ordinary litigant. The general rule is that a law society is entitled to its costs, even if unsuccessful. Where there is dishonesty involved in the litigation, as in this case, the appropriate scale should have been that of attorney and client. The full bench did not have regard to these principles and in my view did not exercise its discretion judicially.

ORDER

[32] In the light of the foregoing the following order is made:

(d) The appeal is upheld with costs on the attorney and client scale.

(e) The order of the full bench is set aside.

(f) In its stead the following order issues against the respondents, Mr Mogami and Mr Mabuse:

i. They are reprimanded for their unlawful, unprofessional and unethical conduct.

ii. They are ordered to account properly to the complainants Motshephe, Mashilo and Buda within two months of this judgment, and to supply the applicant with a report on the accounting supported by vouchers.

iii. They are ordered to comply with the provisions of sections 55 and 84A of the Attorneys Act and recognise the applicant's jurisdiction.

iv. They are to pay, jointly and severally, the costs of the applicant on an attorney and client scale, including the reasonable costs of the inspection of the accounting records of the respondents; the reasonable costs of the curator; and the reasonable fees and expenses of any person consulted or engaged by the curator.

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L T C HARMS
DEPUTY PRESIDENT

For Appellant: A T LAMEY

Instructed by: ROOTH WESSELS MOTLA CONRADIE INC
PRETORIA
NAUDES ATTORNEYS
BLOEMFONTEIN

For Respondents: Z P MAKONDO

Instructed by: 1ST AND 2ND RESPONDENTS:

KGOMO MOKHETLE & TLOU ATTORNEYS
MAFIKENG
MABALANE SEOBE INC
BLOEMFONTEIN

3RD RESPONDENT:

MOTLABANI ATTORNEYS
MAFIKENG
MABALANE SEOBE INC
BLOEMFONTEIN