THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 874/11
Reportable

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES **Appellant**

and

SIPHIWE FREEMAN DUBE **Respondent**

Neutral citation: *Law Society of the Northern Provinces* v *Siphiwe Dube* (874/2011) [2012] ZASCA 137 (27 September 2012).

Coram: **Mthiyane DP, Heher,Mhlantla, Pillay and Petse JJA**

Heard: **27 August 2012**

Delivered: **27 September 2012**

Summary: Attorneys Act 53 of 1979 – misconduct – appropriate order – suspension or removal from roll – whether court a quo misdirected itself in the exercise of its discretion in relation to an appropriate sanction – whether the general rule relating to costs in matters involving the law society should have been applied – acts of dishonesty not so serious to warrant removal from roll – attorney conditionally suspended from practice – costs order altered.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Mothle and Raulinga JJ sitting as court of first instance):

1 The appeal is dismissed save for paragraph 3 of the order of the court below which is set aside and substituted with the following:

'3. The respondent is ordered to pay the costs of the application on an attorney and client scale.'

2 The respondent is ordered to pay the costs of the appeal.

JUDGMENT

MHLANTLA JA (MTHIYANE DP, HEHER, PILLAY and PETSE JJA concurring):

[1] The appellant is the Law Society of the Northern Provinces incorporated in terms of section 56 of the Attorneys Act 53 of 1979 (the Act). The respondent is Mr Siphiwe Freeman Dube, an attorney practising in the province of Gauteng. The appellant launched an application in the North Gauteng High Court, Pretoria in terms of section 22(1)*(d)* of the Act and sought an order that the respondent's name be struck from the roll of attorneys. Instead of granting the relief sought, the court below (Mothle J, Raulinga J concurring) suspended the respondent from practice for one year. It further ordered him to pay R80 000 to his former employer and R15 000 to a former client. Other ancillary orders relating to his employment were made. The respondent was also ordered to pay the appellant's costs of the application on the party and party scale. The appellant appeals against two of the orders contending that the

respondent should have been struck off the roll and that a punitive costs order should have been issued against him. The appeal is with the leave of the court below.

[2] Section 22(1)*(d)* of the Act provides that a person who has been admitted and enrolled as an attorney may on the application of the law society be struck off the roll or suspended from practice if he or she, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney.

[3] Regarding applications of this nature, Harms DP stated in *Law Society, Northern Provinces v Mogami*:[1]

'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 enquiry. 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 enquire 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….'

[4] In *Summerley v Law Society, Northern Provinces*,[2] Brand JA enunciated the test to be applied during the third stage of the enquiry as follows:

'The third enquiry again requires the Court to exercise a discretion. At this stage the Court must decide, in the exercise of its discretion, whether the person who has been found not to be a fit and proper person to practise as an attorney deserves the ultimate

[1] *Law Society, Northern Provinces v Mogami* 2010 (1) SA 186 (SCA) para 4.
[2] *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA) para 2.

penalty of being struck from the roll or whether an order of suspension from practice will suffice.'

[5] Before us there is no dispute between the parties about the findings of the court below in respect of the first and second stages of the enquiry. The appeal concerns the third stage and in that regard two issues arise for consideration in this appeal. First, whether the sanction imposed by the court below is appropriate having regard to the respondent's unprofessional conduct and dishonesty. Put differently, the issue is whether the court misdirected itself in the exercise of its discretion in relation to an appropriate sanction. Second, whether the respondent should have been ordered to pay the costs of the application on a punitive scale.

[6] The application launched by the appellant in the court below arose from the following factual background. The respondent was admitted as an attorney of the North Gauteng High Court on 12 February 2007 at the age of 28 years. On 1 February 2008, he was employed by Maluleke Msimang & Associates, a firm of attorneys in Pretoria, (the firm) as a professional assistant. On 7 October 2008, whilst still in the employ of the firm, unbeknown to his employers and without their consent, the respondent approached the appellant and registered an attorney's practice with the latter under the name of Freeman Dube Attorneys. In his application for registration, he advised the appellant that although he was opening his own practice, he would still remain in the employ of the firm. The respondent commenced practising for his own account on 1 November 2008.

[7] The firm subsequently discovered that the respondent had stolen some of its clients' files. It was established that in certain instances the respondent's practice was acting for the firm's clients. In one particular instance a conflict of interest had arisen when in the same matter he acted through his practice on behalf of a claimant in a third party claim whilst he simultaneously acted on instructions of his employer and represented the Road Accident Fund (RAF), a statutory insurer established in terms of the Road Accident Fund Act 56 of 1996.

[8] On 5 June 2009, the firm launched an application in the high court and sought an interdict against the respondent for the delivery of its clients' files. The application was settled on the basis that the respondent would return the files and pay an amount of R80 000 to the firm, being the fees due to it upon receipt of the proceeds of a third party claim from the RAF. On 3 July 2009 the respondent signed an undertaking to pay the R80 000 but failed to do so. The firm lodged a complaint with the appellant. The complaint related to the respondent's unprofessional conduct relating to his failure to obtain its consent before registering his practice, the theft of the files as well as his failure to pay over to the firm the amount of R80 000.

[9] The appellant, through its staff, conducted its own investigation and uncovered further acts of misconduct and dishonesty against the respondent. These related firstly, to the respondent's failure to comply with rule 70 of the appellant's rules (the rules), which required timeous submission of an auditor's report. In this regard, the respondent was obliged to have submitted an opening auditor's report on or before 28 February 2009 and an auditor's report for the period ending 28 February 2009 on or before 31 August 2009. The respondent obtained unqualified

audit reports. These were however only submitted on 27 October 2009 without any explanation for the late submission. Secondly, the respondent had simultaneously acted on behalf of the plaintiff and the defendant in a third party claim and when the matter was settled, had contravened rule 68.8 in that he had delayed in making payment to a client or misappropriated the funds. Thirdly, he had submitted a bill of costs that included false items to the RAF. In this regard, the respondent had claimed fees for travelling from Pretoria to Limpopo and attending court when he in fact never did so. He further claimed counsel's fee of R13 750 when no advocate nor attorney attended court.

[10] As a result of this discovery, the appellant launched an application in two parts in the court below. Part A was for an interim order suspending the respondent from practice pending the final determination of part B of the application to have his name struck off the roll. On 17 December 2009, Botha J granted the interim order suspending the respondent. He referred the matter back to the appellant to appoint a disciplinary committee to hold an inquiry into the allegations of unprofessional conduct against the respondent.

[11] The appellant instituted the disciplinary inquiry. The respondent faced several charges involving dishonesty, unprofessional conduct and non-compliance with the rules. Some of the charges were withdrawn at the commencement of the inquiry. The respondent pleaded guilty and was found guilty of the late submission of the auditor's reports, conducting a practice for his own account without the consent of his employer, theft of three client files from his employer and creating a conflict of interest when he simultaneously acted for the plaintiff and the defendant in the same third party claim.

[12] The inquiry was finalised on 9 June 2010 and after consideration of all the evidence, the respondent was found not guilty of overcharging a client. He was in addition to the charges referred to in para 11 above found guilty of the following charges:

(a) submitting an account to the RAF for payment which included false items in a party and party bill of costs;

(b) misappropriating an amount of R15 000 from the proceeds of a third party claim;

(c) practising as an attorney for his own account without being in possession of a fidelity fund certificate in contravention of section 41(1) and (2) of the Act; and

(d) failing to honour an undertaking to pay an amount of R80 000 to the firm on receipt of the proceeds of a third party claim from the RAF.

[13] After the conclusion of the disciplinary enquiry, the appellant served a supplementary affidavit on the respondent detailing the investigations conducted by a firm of accountants appointed by the appellant as well as the findings and recommendation of the disciplinary committee. The council of the appellant resolved to launch an application for the respondent's name to be struck from the roll of attorneys. The respondent did not file any affidavit to contest the allegations in the supplementary affidavit.

[14] Part B of the application was heard by the court below. It concluded that the respondent was not a fit and proper person to continue practising as an attorney as provided for in section 22(1)*(d)* of the Act. The court found that the respondent was naïve, immature, lacked experience and insight and had as a result succumbed to greed. It accepted that the respondent had committed acts of dishonesty and stated

that he had come perilously close to having his name struck from the roll. It concluded that such a sanction was too severe and was not suitable under the circumstances. The court held that an appropriate order would be one suspending him from practice for a certain period and ordering him to repay his ill-gotten gains. It accordingly issued an order suspending the respondent from practice for one year and imposed further restrictions on him after the expiry of the period of suspension. In this regard, he was precluded from practising for his own account either as a principal or in partnership or in association with or as a director of a private company for a period of two years after the expiry of the period of suspension. The court further ordered him to pay R80 000 to his former employer and R15 000 to a former client as well as the costs of the application on a party and party scale.

[15] As I said earlier in this judgment, the court below, in the exercise of its discretion, declined to grant the order sought by the appellant and suspended the respondent from practice. It is trite that a court of appeal has limited powers to interfere with the discretion of a lower court. In *Law Society of the Northern Provinces v Sonntag*,[3] Malan JA remarked that:

'The decision whether an attorney who has been found unfit to practise should be struck off or suspended is a matter for the discretion of the court of first instance. That discretion is a "narrow"one:

"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 reasons, or materially misdirected itself

[3] *Law Society of the Northern Provinces v Sonntag* 2012 (1) SA 372 (SCA) para 14, quoting *Botha v Law Society, Northern Provinces* 2009 (1) SA 227 (SCA) para 3.

in fact or in law. It must be emphasised that dishonesty is not a *sine qua non* for striking-off."'

[16] Before I deal with the main issue it is appropriate that I dispose of the issues relating to the general acts of misconduct and breach of the rules by the respondent. These are the non-compliance with rule 70 and the failure to honour an undertaking to pay his former employer.

Non-compliance with rule 70

[17] In this regard, it was submitted on behalf of the appellant that the respondent breached rule 70 in that he had failed to submit the auditor's reports and practised without the fidelity fund certificate. The evidence revealed that the opening auditor's report was submitted six months after its due date whilst the annual report was two months late. Both reports were unqualified. The purpose of rule 70 is to satisfy the appellant that the attorney's accounting records are kept in accordance with the Act and the rules and that an attorney handles and administers trust moneys properly and responsibly. The misconduct in issue here related to the late submission of the reports. It seems to me that the respondent was slack in the conduct of his practice and compliance with the rules. That may have been due to the fact that he had just commenced practising for his own account. It is apposite to state that in so far as the annual report for the period ending 28 February 2010 is concerned, an auditor's certificate was in fact submitted on time and was unqualified. This, in my view, is an indication that the respondent had learnt from his previous experience. I consider that a warning would be an appropriate sanction for a transgression of this nature.

Failure to honour the undertaking

[18] I turn to the respondent's failure to honour the undertaking. It is not in dispute that the respondent failed to honour the undertaking dated 3 July 2009. He only paid his former employer on 24 March 2012. In this court, it was submitted on behalf of the respondent that the evidence showed that on receipt of the proceeds of the third party claim, Mr Msimang, a senior partner of the firm, had acceded to the respondent's request to grant him an extension of the period within which to pay the R80 000. No evidence was presented on behalf of the appellant to contest this explanation. In the result, we have to accept that the respondent had made prior arrangements with Mr Msimang in this regard.

Acts of dishonesty

[19] As regards the acts that involved an element of dishonesty, the appellant's legal representative submitted that the sanction imposed was too lenient and that the court misdirected itself in the exercise of its discretion. It was contended that the court did not have regard to the general principles applicable where an attorney is found guilty of a transgression involving dishonesty. He argued that the transgressions by the respondent when viewed cumulatively are so serious as to warrant the removal of his name from the roll. Although this argument merits serious consideration, I think it falls to be rejected. It is true that the respondent made himself guilty of certain serious transgressions. But every case must be considered against the setting of its own peculiar facts. In my view, some of the complaints against the respondent lacked particularity whilst the others varied in seriousness. These are the theft of three files, the misappropriation of an amount of R15 000, the submission of an inflated bill of costs, registration of the respondent's practice without his

employer's knowledge and consent and the issue relating to conflict of interests. I propose to deal with each of these transgressions in turn.

Theft of files

[20] There is no doubt that the theft of client files by an employee is a serious transgression. The respondent has to be censured.

Misappropriation of funds

[21] Mr Motimele, an attorney in Limpopo, was involved in a motor collision and sustained bodily injuries. The respondent acted for Mr Motimele in his third party claim. The matter was settled and the RAF paid a lump sum of R15 000. The respondent transferred the entire amount to his business account and when challenged about the transfer, stated that he had concluded an oral loan agreement with Motimele. The appellant did not provide any evidence to contest the respondent's explanation. It was not shown that the respondent was untruthful. Be that as it may, it is irregular and unethical for an attorney to conclude a loan agreement with his or her client.

Submission of an inflated bill of costs

[22] The third act involving dishonesty relates to the submission of a bill of costs to the RAF. As indicated earlier in this judgment, the respondent had claimed fees for travelling from Pretoria to Limpopo and attending court when he in fact never did so as well as counsel's fee when no legal representative attended court. The respondent in his answering affidavit admitted submitting the bill of costs with the false items and expressed remorse for his conduct. He accordingly did not lie under oath. The RAF did not suffer any prejudice as the act of dishonesty was

discovered before the bill of costs was taxed. One must infer though that the respondent intended to mislead the RAF and has to be censured.

Registration of the respondent's practice

[23] The issue of the registration of the respondent's practice was clarified by the appellant's legal representative. He informed us that an attorney may conduct a practice for his or her own account whilst employed by another firm of attorneys provided he or she has obtained prior consent from his or her employer to register the practice. He submitted that the respondent committed an act of dishonesty when he failed to disclose to his employer his intention to register the practice. With that submission I agree. He further contended that the court below erred in failing to treat the omission as dishonest but conceded that the respondent's failure did not of itself warrant an order for striking off.

Conflict of interests

[24] Counsel for the respondent conceded that it bordered on dishonesty for the respondent to represent the plaintiff and the defendant simultaneously in a third party claim and fail to disclose such fact to them. Be that as it may, the evidence against the respondent is far from satisfactory. The complaint against the respondent was not adequately investigated. The evidence does not indicate whether the respondent had charged both parties or whether either of the parties was prejudiced in any way. The matter was settled. Nothing flows from this complaint.

[25] To sum up the respondent was young, immature and inexperienced. He stole three files. He was guilty of other transgressions that rendered him unfit to practise his profession. It was irregular and unethical for him to borrow money from a client, albeit a colleague. He admitted his

mistakes, which indicates a measure of remorse. He has not attempted to deceive the court. In *Law Society of the Cape of Good Hope v C*,[4] Galgut AJA said with regard to the implications of a striking-off order:

'The implications of a striking-off order are serious and far-reaching. Such an order envisages that the attorney will not be re-admitted to practise unless the Court can be satisfied by the clearest proof that the applicant has genuinely reformed, that a considerable time has elapsed since he was struck off, and that probability is that, if reinstated, he will conduct himself honestly and honourably in the future.'

[26] Although each case stands against the setting of its own facts and circumstances, it is necessary to have a look at comparable cases in determining whether the court below misdirected itself in the exercise of its discretion.

[27] The first of these examples is *Kekana v Society of Advocates of South Africa*,[5] where the appellant had been practising as an advocate for four years. He and his colleague had appeared as pro deo counsel at Tzaneen Circuit Court. After the conclusion of the trial, they submitted inflated claims to the Department of Justice together with their pro deo claims (they had apparently entertained women). On two separate occasions, they claimed the cost of restaurant meals. The accounts reflected two main courses for each person per night. The bar council held an internal enquiry and later launched an application for the removal of their names from the roll of advocates. The appellant in his answering affidavit made a false statement and denied the presence of the female companions. He asserted that he and his colleague were very hungry and each had consumed two main courses on each night. He repeated this statement in his oral evidence. The court rejected his testimony as false.

[4] *Law Society of the Cape of Good Hope v C* 1986 (1) SA 616 (A) at 640C-D.
[5] *Kekana v Society of Advocates of South Africa* 1998 (4) SA 649 (SCA).

His name was struck off the roll for perpetuating the lies under oath (in his affidavit and in court).

[28] In *Law Society of the Cape of Good Hope v Peter*,[6] the respondent decided to set up practice as a sole practitioner shortly after her admission as an attorney. She experienced financial problems and in the process misappropriated R20 000 to cover the expenses of her practice. The court held that the theft was not the result of a character defect inherent in her but rather a moral lapse brought about by the pressure she had been under. The court confirmed the order of the court of first instance suspending the respondent from practice.

[29] There is no doubt that the appellant in *Kekana* was a senior advocate with more experience and should have known better. He committed perjury, whereas the respondent in this matter admitted his transgressions and showed remorse. He provided plausible explanations where necessary.

[30] Having regard to the sanctions imposed in the above-mentioned cases as well as the respondent's personal circumstances, the finding of the court below cannot be faulted. It correctly set out the nature of the case, the substance of the charges against the respondent and the findings of the disciplinary committee. After evaluating the evidence, it declared that the respondent was not a fit and proper person to practise as an attorney. The court below thereafter proceeded to the third leg of the enquiry. It correctly identified three acts of dishonesty and took into account the respondent's personal circumstances and that he had been in

[6] *Law Society of the Cape of Good Hope v Peter* 2009 (2) SA 18 (SCA).

practice for a relatively short period. In its judgment, the court referred to *Peter* to show that the respondent in that case was not struck off the roll notwithstanding the fact that she was dishonest. It concluded that the principle of redemption should apply.

[31] The court set safeguards with regard to the respondent's future employment. It is common cause that the respondent has been suspended from practice since December 2009 when the interim order was issued. He has accordingly been excluded from the legal profession for almost three years. He is furthermore precluded from practising for his own account or either as a partner or a director for a period of two years upon the expiry of the suspension period. It was conceded on behalf of the appellant that there is no evidence that the respondent may repeat the offences, more so since the respondent will not practise for his own account. There is a further precaution in that the respondent, should he elect to practise for his own account after the expiry of all these periods, will have to satisfy the court that he has redeemed himself. In this regard the appellant has the right to present evidence relating to the respondent's fitness.

[32] The court below was very conscious that the respondent's conduct had brought him to the brink of striking off. In concluding that he should not be pushed over the edge it looked not at the individual offences but at their cumulative effect and it made a value judgment on the rehabilitative prospects of the respondent. The orders issued by the court below reveal that it fairly weighed all the relevant factors including its duty to protect the public and the profession. I cannot conclude that it misdirected itself in the exercise of its discretion. There is accordingly no basis for this

court to interfere. The appeal against the order of suspension falls to be dismissed.

[33] The final issue is costs. The general rule in matters of this kind, is that the respondent has to pay the costs of the law society on an attorney and client scale. This is so because the appellant is not an ordinary litigant as it performs a public duty. It is obliged to approach the court when a complaint, in particular one involving an act of dishonesty, is lodged against an attorney. The appellant in this matter did not act on its own frolic. It was accordingly entitled to an appropriate costs order. There was no reason for the court below to depart from the general rule. In the result, the court below erred and should have ordered the respondent to pay the costs of the application on a punitive scale. The appellant is also entitled to its costs on appeal notwithstanding the fact that the order of the court below has not been set aside and replaced with an order striking the name of the respondent off the roll.

[34] In the result, the following order is made:

1 The appeal is dismissed save for paragraph 3 of the order of the court below which is set aside and substituted with the following:

‘3. The respondent is ordered to pay the costs of the application on an attorney and client scale.’

2 The respondent is ordered to pay the costs of the appeal.

N.Z MHLANTLA
JUDGE OF APPEAL

APPEARANCES:

For Appellant: J Leotlela

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