THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case No: 213/16

In the matter between:

MOTHULOE INCORPORATED ATTORNEYS **APPELLANT**

and

THE LAW SOCIETY OF THE NORTHERN PROVINCE **FIRST RESPONDENT**

THE MINISTER OF JUSTICE OF THE REPUBLIC OF SOUTH AFRICA **SECOND RESPONDENT**

Neutral citation: *Mothuloe Incorporated Attorneys v The Law Society of the Northern Provinces & another* (213/16) [2017] ZASCA 17 (22 March 2017)

Coram: Cachalia, Shongwe, Wallis and Dambuza JJA and Mbatha AJA

Heard: 1 March 2017

Delivered: 22 March 2017

Summary: Attorneys Act 53 of 1979: complaints having been lodged with the Law Society against a practitioner for failing to account to trust creditors: practitioner admitting having received the money but imposing conditions before releasing it to trust creditors: Law Society directing the practitioner to produce for inspection records and books in his possession and under his control

in terms of s 70(1) of the Act: practitioner refusing to comply and challenged the decision of the Law Society: sought to review and set aside decision as irrational: practitioner blatantly disregarding the law and rules: such conduct cannot be countenanced: conduct unprofessional.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Louw J sitting as court of first instance)

The appeal is dismissed with costs on the attorney and client scale.

JUDGMENT

Shongwe JA (Cachalia, Wallis and Dambuza JJA and Mbatha AJA concurring)

Introduction

[1] This is an appeal against the judgment and order of the Gauteng Division of the High Court, Pretoria (Louw J) dismissing the appellant's review application with costs on the attorney and client scale, and ordering the appellant to make documents and records available to the first respondent as prayed for in the first respondent's counter-application. The appellant is Mothuloe Incorporated, a law firm based in Johannesburg. Mr Mothuloe is the single director of the firm and practises for his own account. He was admitted as an attorney, notary and conveyancer in 1996, and is a member of the first respondent, the Law Society of the Northern Provinces, which is incorporated as the Law Society of the Transvaal (Law Society) in terms of s 56 of the Attorneys Act 53 of 1979 (the Act). Where I refer to the appellant, it should be understood to include Mr Mothuloe as well.

[2] During 2013, the Law Society received several individual complaints and a complaint from Koikanyang Incorporated Attorneys on behalf of the appellant's trust creditors against the appellant. The complaint related to the

handling of trust funds by the appellant and his failure to account and to reimburse moneys that had been paid into his trust account by the trust creditors in respect of conveyancing fees for the transfer of immovable properties – where such transfer had never occurred. The Law Society wrote a letter to the appellant on 22 August 2013 requesting him to comment on the complaint and also to provide a copy of his ledger account relevant to the complaint and/or proof that the amount forming the subject of the complaint was available in his trust account.

[3] The appellant refused to deliver the documents and records, citing various reasons. Dissatisfied with the appellant's response, the Law Society directed him to produce for inspection any book, document and record in his possession or custody or under his control which related to his practice in terms of s 70(1) of the Act. Despite several letters and requests to meet, the appellant refused to comply with this directive. The appellant subsequently lodged an application to have the Law Society's directive requesting him to act in terms of s 70(1) of the Act reviewed and set aside. The Law Society opposed that application, and simultaneously filed a counter-application wherein it sought an order compelling the appellant to produce his books of account and other relevant documents and record for inspection. It also prayed for costs on the attorney and client scale. As stated above the review application was dismissed and the counter-application granted as prayed. Disgruntled by the court a quo's decision, the appellant approached the court a quo for leave to appeal, and leave was granted to this court. I shall return to this aspect later in the judgment, but first, I turn to consider the factual background which gave rise to the appeal.

Factual background

[4] The facts in this case are largely common cause. During 2012, Koikanyang Incorporated were instructed, by the appellant's trust creditors, to

demand payment of trust deposits held by the appellant. The total amount was in the region of R 409 000. The trust deposits were made pursuant to the purchase, by the trust creditors, of residential properties from the North West Housing Corporation (the Corporation). The Corporation had appointed Microzone Close Corporation (Microzone) to facilitate the sale of the immovable properties. Mr Seriba, the agent who represented Microzone, instructed the purchasers to deposit the purchase price into the appellant's trust account, as the appellant had been appointed as the conveyancer to attend to the registration and transfer of the properties. The trust creditors deposited money into the appellant's trust account but the immovable properties were never transferred as agreed.

[5] When the purchasers subsequently complained to Mr Seriba about the properties not having been transferred, they were told that Microzone no longer had any relationship with the appellant. They also complained to the Corporation, which assisted them by attempting in vain, to contact the appellant. Some of the trust creditors wrote letters to the appellant requesting their moneys but their efforts drew no positive response. As a result, the trust creditors appointed Koikanyang Inc. Numerous letters were written by the Law Society to the appellant to account to the trust creditors, but the appellant insisted that Koikanyang Incorporated produce written proof that they were instructed to act for the trust creditors and also demanded that the trust creditors produce the original deposit slips as proof that they deposited the moneys into his account. The Law Society called the appellant to a meeting which he refused to attend. A representative of the Law Society was sent to the appellant's offices but he refused to have a meeting with the representative, and demanded a court order before he would allow the representative to have access to his books of accounts.

[6] As alluded to earlier, in the court a quo the appellant sought an order declaring s 70 of the Act invalid and of no force and effect to the extent that it was inconsistent with the provisions of the Bill of Rights in terms of s 172(2)*(a)* of the Constitution. He also requested the review and setting aside of the decision of the Law Society in terms of s 70 of the Act. The declaration of invalidity of s 70 was later abandoned by the appellant – which resulted in the second respondent, the Minister of Justice, playing no part in the litigation and subsequently refraining from forming part of this appeal. The Law Society opposed this application on the ground inter alia, that s 70(1) of the Act entitled the Law Society to access the requested documents and records. The appellant claimed that the requested documents were protected by legal privilege, and also that Koikanyang Inc had to prove its mandate

[7] In the counter-application the Law Society sought an order to compel the appellant to make certain records and documents available to it for inspection in terms of s 70(1). It will not be necessary in this judgment to tabulate all the books and records required by the Law Society. In opposing that application, the appellant claimed that the Law Society was not entitled to access the requested documents.

[8] The purpose of the provisions of s 70 is to enable the Law Society to decide whether an inquiry in terms of s 71(1) of the Act should be held. Subsection 70(2) of the Act provides that: ‘The refusal or failure by a practitioner to comply with a direction in terms of ss (1) shall constitute unprofessional conduct’. It is common cause that the appellant refused and failed to comply with directive of the Law Society. Clearly the appellant is guilty of an unprofessional conduct.

[9] The court a quo found that the appellant had failed to make out a proper case for the review and setting aside of the decision of the Law Society and ordered that the appellant must produce the required records and documents in his possession. It rejected the appellant's assertion that attorney and client privilege prohibited him from discovering the documents and records as such privilege is open to the client and not the attorney himself.

Statutory framework

[10] The legal framework concerning the attorney's profession is not complex. Section 58 of the Act deals with the objects of the Law Society, *inter alia* that it shall 'maintain and enhance the prestige, status and dignity of the profession' (58*(a)*); 'uphold the integrity of practitioners' (58*(e)*); 'provide for the effective control of the professional conduct of practitioners' (58*(g)*) and 'promote uniform practice and discipline among practitioners' (58*(h)*). Section 59 of the Act deals with the powers of the Law Society being amongst others, 'generally, [to] do anything that is necessary for or conducive to the attainment of the objects of the society' (59*(k)*). Section 60(1) of the Act deals with the council being a body, which manages and upholds the affairs of the Law Society. Sections 68 and 69 deal with the duties and powers of the council. Section 70, which is implicated in this case, deals with the council's powers to direct a practitioner to produce books and records for purposes of an enquiry under s 71 in order to enable it to decide whether such an enquiry should be held. The council is also empowered to make rules which are binding on practitioners (s 74(1)). However in terms of Government Gazette, 26/2/16, No. 39740 it was notified that the Rules of the Law Society of the Northern Provinces made under s 74(1) of the Act 'are hereby repealed in toto to be replaced by the Rules of the Attorneys Profession'. The Rules of the Law Society were still applicable to the appellant as they were repealed only after the commencement of this case.

Discussion

[11] Before us, the appellant raised three issues, namely: (a) 'the fairness and reasonableness and therefore the rationality' of the decision of the Law Society to issue a directive in terms of s 70 of the Act; (b) the validity of the appellant's conditional demand that Koikanyang Inc. produce written proof of its mandate to represent the trust creditors and also that the trust creditors produce proof of their identity entitling them to the moneys and (c) the applicability of attorney and client privilege in respect of the documents and records in possession and control of the appellant in the absence of a waiver by the relevant trust creditors. Four days before the appeal was heard the appellant filed supplementary submissions seeking to expand his grounds of appeal. No prior permission had been requested to file these further submissions. The submissions introducing, for the first time, the applicability of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and s 33 of the Constitution. This was clearly not in line with court rules. I shall deal with the issue of PAJA later in the judgment.

[12] Counsel for the appellant submitted that the Law Society's directive was over broad and that there was no limit to what the appellant had to produce. He criticised this alleged broadness, stating that the Law Society may as well have requested the appellant to close shop. It is clear that counsel was perhaps not mindful of what this court had said in *Mda v Law Society of the Cape of Good Hope* [2012] ZASCA 145; 2012 (1) SA 15 (SCA) regarding the extent of the Council's powers to inspect records and documents. In that case, paras 7 and 9, this court stated:

'Concerning Mr Mda's submission that s 70(1) permits a council to inspect documentary material pertaining only to specific allegations of misconduct, this cannot be so. As I have indicated above, the section does not limit a council's authority when it is deciding whether or not to hold a misconduct enquiry. However, once the council has decided to hold an enquiry, ss 71(2)*(a)*(i) and (ii) require any person who is summoned to testify to produce any documentary material that has a bearing on the subject matter of the enquiry. Section 71(2) is

concerned only with documentary material that may be relevant to an enquiry. Section 70(1), on the other hand, has a specific purpose, which is to place a council in a position to decide whether or not to hold an enquiry. This is why the legislature permitted a broader inspection under s 70(1) than it did under s 71(2)'.

(See also *Law Society of Northern Provinces v Smith* 2016 JDR 1422 (GP) para 45 unreported case no 62599/2011 (22 July 2016).

[13] It is common cause that the appellant received money from the trust creditors. The appellant contends that because he was prepared to pay back the money on certain conditions, the Law Society was thus unreasonable and unjustified in issuing the directive in terms of s 70(1) of the Act. In my view this is a spurious excuse and it raises suspicions about whether the money had always been held in his trust account. However, counsel for the appellant, rightly so, conceded that the Law Society was justified in invoking the provisions of s 70(1) of the Act. In my view that put paid to the question whether or not it was reasonable and therefor rational for the Law Society to issue the directive. It stands to reason that the appellant's conditional demand was unjustified.

[14] On the question of whether the appellant was justified in raising attorney and client privilege under the circumstances, I disagree that he was justified. I agree with the court a quo that 'the privilege is, in any event, the client's privilege and cannot be invoked by the attorney to prevent an inspection of his or her records'. Generally, communications between a professional legal and his client are in certain circumstances, inviolate. The circumstances under which privilege may obtain may be summarised as follows: (a) the attorney must be an advisor in a professional capacity: (b) the communication has to have been made in confidence: (c) it has to be made for the purposes of advice or litigation. The position is that the client must claim the privilege, and the

attorney may claim the privilege on behalf of his or her client after the client has made an informed decision. In my view had the appellant responded positively to the letter dated 22 August 2013 wherein the Law Society requested a copy of the appellant's ledger account in connection with this particular matter, in all probabilities the Law Society would not have directed in terms of s 70(1) of the Act. The question of attorney and client privilege would also not have been an issue. The trust creditors would have welcomed the idea of the appellant producing his books for inspection by the Law Society because that would clearly prove their complaint as being legitimate. At the stage of implementing s 70(1) the question of attorney and client privilege does not arise.

[15] I now deal with the applicability of PAJA. The issue of PAJA raised in the supplementary submissions was not raised in the founding papers. It is settled law that the purpose of pleadings is to define the issues for the parties and the court. Affidavits do not only constitute evidence, but they also fulfil the purpose of pleadings. Once an applicant has pinned his or her colours to the mast, he or she is not permitted to change same and plead a new cause of action. (See *Diggers Development (Pty) Ltd v City of Matlosana & another* [2011] ZASCA 247; [2012] 1 All SA 428 (SCA) para 18. In *Minister of Safety & Security v Slabbert* [2009] ZASCA163; [2010] 2 All SA 474 (SCA) para 11, Mhlantla JA observed that:

'It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case'.

A trial by ambush is not countenanced because the opponent must be given an opportunity to comment on the issue or issues raised. In this case the Law Society was not given an opportunity to deal with the provisions of PAJA and/or the provisions of s 33 of the Constitution. Counsel for the appellant readily conceded that PAJA was not mentioned in the founding affidavit.

[16] The appellant voluntarily became a legal practitioner and thus became a member of the Law Society. He was free to choose a profession, but could notopt out of the consequences of his choice. Every institution has rules and such rules must be observed at all times. The Law Society is empowered by law to direct that a practitioner produce for inspection records and books in pursuance of its duty to protect the interests of the public. On the undisputed facts of this case the appellant was not justified to respond to the request by imposing conditions before complying with the directive. It may be so that the appellant had issues with Koikanyang attorneys, – but those issues cannot provide him with a free pass to the directive and may not prejudice the trust creditors who *bona fide* paid money for purposes of purchasing property.

[17] Accordingly, the court a quo was correct in dismissing the application to review the decision of the Law Society. The court a quo was also correct in granting the counter-application. On the above reasons the appeal must fail.

[18] I now turn to the question of leave to appeal – the appellant admitted having received money from the trust creditors and he admitted having kept the money over a long period and failing to account to the trust creditors, which conduct constitutes unprofessional conduct and moreover it contravenes the rules of the Law Society. Section 70(1) is a preliminary procedure where the guilt or lack thereof is irrelevant at that stage – therefore it would always be advisable, when dealing with an application for leave to appeal to look at the enabling statute to find guidance. It is important to mention my dissatisfaction with the court a quo's granting of leave to appeal to this court. The test is simply whether there are any reasonable prospects of success in an appeal. It is not whether a litigant has an arguable case or a mere possibility of success. Section 17(1) of the Superior Courts Act 10 of 2013 provides that:

'Leave to appeal may only be given where the Judge or Judges concerned are of the opinion that–

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration';

This court has in the past bemoaned the regularity with which leave is granted to this court in respect of matters not deserving its attention. (See *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC & others* 2003 (5) SA 354 (SCA) para 23.) This is one case where leave to appeal should have been refused for lack of reasonable prospects of success.

[19] The following order is made:

The appeal is dismissed with costs on the attorney and client scale.

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J B Z Shongwe
Judge of Appeal

Appearances

For the Appellant:	D P J Rossouw SC Instructed by: Friedland Hart Solomon & Nicholson, Pretoria; Rosendorff Reitz Barry Attorneys, Bloemfontein.
For the Respondent:	P J Smith Instructed by: Rooth & Wessels Inc., Pretoria; Phatsoane Henney, Bloemfontein.