THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable
Case No: 783/2016

In the matter between:

JOSEPH JOSHUA WILKINSON **APPELLANT**

and

THE LAW SOCIETY OF THE NORTHERN PROVINCES **RESPONDENT**

Neutral Citation: *Wilkinson v The Law Society of the Northern Provinces* (783/2016) [2017] ZASCA 69 (31 May 2017)

Coram: Lewis, Wallis, Saldulker and Zondi JJA and Coppin AJA

Heard: 12 May 2017

Delivered: 31 May 2017

Summary: Striking off is an appropriate sanction for an attorney guilty of misappropriation of trust moneys and failure to account for funds entrusted to him: No reason to interfere with the exercise of discretion.

ORDER

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

The appeal is dismissed with costs and such costs to be taxed on the scale of attorney and client.

JUDGMENT

Zondi JA (Lewis, Wallis and Saldulker JJA and Coppin AJA concurring):

[1] The issue in this appeal is whether the Gauteng Division, Pretoria, of the High Court (Makgoka J, Phatudi AJ concurring) exercised its discretion judicially when it ordered that the appellant's name be struck off the roll of attorneys and conveyancers. It determined that the appellant had contravened certain rules of the respondent (the Law Society) relating to the proper keeping of a trust account by an attorney, and the duty of an attorney to account to a client within a reasonable time after the conclusion of a mandate.

[2] The issue must be considered against the following factual background. The appellant is an admitted attorney and conveyancer practising as such in Pretoria and is a member of the Law Society. He was admitted as an attorney in 1998 and at the time of the occurrence of the events giving rise to these proceedings, he had been practising on his own account since 2011.

[3] The Law Society on 20 June 2014 instituted motion proceedings in the Gauteng Division, Pretoria, of the High Court (to which I shall, for convenience refer as the high court) against the appellant, seeking an order, among others, that his name be removed from the roll of attorneys and conveyancers. This was based on two complaints: one of misappropriation of trust funds and the other related to the appellant's failure to account to his client in contravention

of Rule 68 of the Law Society Rules. Those proceedings were brought in terms of s 22(1)(d) of the Attorneys Act 53 of 1979, which provides that any person who has been admitted and enrolled as an attorney may, on application by the Law Society concerned be struck off the roll or suspended from practice by the court, if that person, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney. As alluded to above, the high court determined that the respondent had transgressed the relevant rules of the Law Society. In the exercise of its discretion the high court determined that the respondent was not fit and proper to continue to practise as an attorney and a conveyancer. It accordingly ordered that his name be struck off the roll of attorneys and conveyancers. The high court granted further ancillary orders relating to the appointment of a curator bonis to take control of the appellant's accounting records, files and documents, and to administer the appellant's trust account. The appeal is against that judgment with special leave of this court.

[4] It is now settled that an application for the removal from the roll, or suspension from practice, of an attorney involves a three-stage enquiry. (See *Malan & another v Law Society Northern Province* 2009 (1) SA 216 (SCA) para 4.) First, the court has to determine whether the alleged offending conduct has been established on a balance of probabilities. It is a factual enquiry. Second, consideration must be given to the question whether, in the discretion of the court, the person concerned is not 'a fit and proper person to continue to practice as an attorney'. This involves a weighing up of the conduct complained of against the conduct expected of an attorney and is a value judgment. Third, the court is required to consider whether, in light of all the circumstances, the name of the attorney concerned should be removed from the roll of attorneys or whether an order suspending him or her from practice would suffice. (See *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA) para 2 and the cases there cited.)

[5] The facts underlying the first leg of the enquiry, namely the offending conduct, are briefly the following. The National Department of Rural Development and Land Reform (the department) lodged a complaint with the

Law Society against the appellant alleging that the appellant had failed to account to it in respect of funds it had entrusted to him. Pursuant to the complaint, the Law Society wrote to the appellant seeking a response from him, but the appellant neglected to answer its correspondence. In consequence the Law Society, on 12 November 2013, summoned the appellant to appear before its Investigating Committee on 28 November 2013. At the conclusion of the investigation, the Committee resolved on 18 December 2013 that charges be brought against the appellant. Following upon the department's complaint, the Law Society had instructed its auditor, Mr Swart, to inspect the appellant's accounting records and to report on any aspects considered irregular or unsatisfactory and any contravention by the appellant of the provisions of the Act and its Rules. This was done and on 6 May 2014 Swart furnished the Law Society with a report disclosing shortfalls in the trust account, an absence of proper accounting records and a number of contraventions of the Law Society's rules concerning the maintenance of proper accounting records.

[6] The department's complaint against the appellant was that, pursuant to a sale agreement it concluded with Willbo Investments 4 (Pty) Ltd (Willbo) for the purchase of land in respect of which a claim had been lodged by a certain community in terms of the Restitution of Land Rights Act 22 of 1994, it paid R28.8 million into the trust account of the appellant. The appellant was appointed by Willbo to attend to the transfer of the land from Willbo to the department. In terms of the sale agreement, the department instructed the appellant to invest the funds into a separate bank account in terms of s 78(2A) of the Act (the section 78(2A) investment) pending registration of the transfer of the property with the interest thereon to be credited to the department. After transfer of the property, the department wrote to the appellant requesting an account for the interest accrued on the deposit and details of when and where it had been paid to the department. The appellant failed to furnish the required information to the department.

[7] Swart stated in his report that he inspected the appellant's accounting records on three occasions. He confined his inspection to the period 1 March

2012 to 14 October 2013. His report revealed that the trust balances of the firm's trust clients were not kept up to date and reconciled monthly. It further stated that, as at 14 October 2013, the trust account of the appellant had a shortage of R10 561 599,37 in contravention of s 78(1) of the Act read with the relevant rule of the Law Society Rules, which requires the firm to ensure that no account of any trust creditor is in debit.

[8] As regards the department's complaint the appellant alleged that he had an agreement with the department's Chief Director, Mr Bogatsu, to keep the interest earned on the funds he invested on the department's behalf, as security for the payment of his fees for work he claimed to have performed on its behalf. In support of the allegation that he had such agreement the appellant sought to rely on a transcript of the conversation he secretly recorded in a meeting he had with an employee of the department, Ms Kgomotso Sefalo. The appellant also produced a pro forma account detailing his fees and disbursements in the amount of R954 735.26, which he alleged the department owed him for the work he performed pursuant to the agreement.

[9] As regards the trust account deficit, the appellant admitted that there was a shortage, but denied that it was to the extent suggested by the Law Society. He contended that the deficit was about R30 000 which he alleged he had since rectified. In support of this contention, the appellant relied on a report compiled by Mr Wium, an auditor he appointed to report on the status of his firm's accounting records. In that report Wium stated that the unaudited reconstructed Winlaw trial balance indicated a shortage of R30 143.35. The appellant conceded that his trust accounting records were in a state of disarray, but blamed it on his erstwhile bookkeeper, Ms Nel, whom he alleged had deleted all the electronic files containing the financial records, and on two lightning strikes of 13 November and 5 December 2013 which corrupted electronic files containing his accounting records.

[10] In its judgment the high court found that the appellant had failed to account to the department for the interest on the money entrusted to him for

investment and that the appellant's allegation that there existed an agreement between him and the department in terms of which he could set off his fees against the interest earned, was unsubstantiated. Finally it held that there was a shortage in the appellant's trust account at all times during the period under consideration.

[11] The findings of the high court cannot be faulted. They are based on facts which were either common cause or were not seriously disputed by the appellant.[1] As far as the department's complaint is concerned, the allegation that the appellant failed to account for the interest on the deposit that should have been placed in an interest bearing account for its benefit was undisputed. Had the appellant invested the money in a separate trust account as instructed by the department, he would have been able to provide proof of such investment by showing a bank statement confirming the investment of the funds concerned. This the appellant failed to do. He could not in any event have invested the funds because the accounting records inspected by Swart revealed that the appellant dissipated a substantial portion of the funds. Within two weeks he withdrew R10 million for his own benefit and before transfer of the property he paid R10 million to one of the directors of Willbo from the total amount of R28.8 million. The appellant alleged in his answering affidavit that the latter payment made prior to transfer was authorised by the seller and Bogatsu on behalf of the department. But he does not provide proof of such authority. He also contends that no one suffered any loss as the interest payable to the department was calculated as if the money had been invested. However, the appellant fails to state the amount of interest and he has never produced a calculation showing the interest that accrued to the department. In these circumstances, the conclusion is ineluctable that the appellant did not invest the department's funds nor did he reimburse it for the interest that it lost.

[12] The appellant's suggestion that he was entitled to retain the interest earned on the funds entrusted to him as fees for the work he alleged he had

[1] *Malan and another v Law Society of the Northern Provinces* [2008] ZASCA 90, 2009 (1) SA 216 (SCA) para 12.

performed in terms of the agreement between him and the department, does not bear scrutiny. In the first place, in relation to the transaction in issue, he acted for the seller not the department, and therefore he could not have expected the department to pay him. The transcript of the conversation the appellant surreptitiously recorded in the meeting with Ms Sefalo belies his claim that he had an agreement with Bogatsu to retain the interest earned on the R28.8 million to cover his fees. The transcript shows that Ms Sefalo asked him about payment of the interest on more than one occasion during the meeting. She also made it clear that it was for him as the attorney to invest the money and to account for the interest. Secondly, the appellant failed to produce a letter, to which he referred during his conversation with Ms Sefalo, confirming the details of the agreement he allegedly concluded with Bogatsu. Thirdly, the conversation made it clear that he was talking about the fees his client, Willbo, had refused to pay for attending to the transfer of the property, but the pro forma bill of costs that he produced after the Law Society commenced these proceedings was for entirely different costs. The pro forma bill of costs on which the appellant relied to establish that he did some work for the department, did not support his claim. He noted in that bill of costs that his first consultation with the department was on 20 October 2011. This could not be correct, because the sale agreement in terms of which he was instructed to invest R28.8 million on behalf of the department was concluded during March 2012. It is apparent from these facts that the alleged agreement on which the appellant seeks to rely to justify his retention of the interest accrued on R28.8 million does not exist and is contrived.

[13] This conclusion is borne out by the fact that when the department on 26 November 2012 asked him to account for the interest he never suggested that he had a right to retain it. In fact, his reply to the department left it with a question. By letter dated 28 November 2012 he informed the department as follows:

‘. . .

2. The interest on the 90% deposit purchase price can be calculated easily by yourselves with regards to the date of payment to our trust account and to the date of

registration. The percentage of interest is stipulated in the Deed of Sale for your easy reference.

3. With regards to the payment of the interest to yourselves, we refer you to Mr Bogatsu for the terms and the conditions between the parties.'

[14] The fact that the appellant's trust account had a deficit is not disputed. As I mentioned earlier, what is disputed is the extent of that deficit. Swart alleged that the deficit was over R10 million. The appellant rejects Swart's report as unreliable on the ground that it is based on insufficient information. He says that Wium's report must be accepted as reliable. In my view, one cannot place any reliance on Wium's report. It is qualified. Wium concluded in his report that due to the lack of internal controls in the appellant's accounting system, and insufficient accounting records having been made available to him, he was unable to express an opinion on whether the appellant's trust accounts for the year ended 28 February 2014 were maintained, in all material respects, in compliance with the Attorneys Act and the Rules. In the circumstances Wium's report does not take the appellant's case any further and does not provide a basis on which Swart's findings can be rejected. Therefore, Swart's conclusion, that the deficit in the appellant's trust account was over R10 million at the relevant time, remains undisputed and must accordingly stand.

[15] In light of all the transgressions the appellant was found to have committed, the high court concluded, correctly in my view, in relation to the second leg of the enquiry that he was no longer a fit and proper person to practise as an attorney and conveyancer of the court. But this is not the end of the matter, because the next question, which is part of the third leg of the enquiry, is whether the appellant's transgressions were such that they should be visited with an order striking his name off the roll, or whether he should be suspended from practice. This court held in *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) para 10 that the appropriate order will 'depend upon such factors as the nature of the conduct complained of, the extent to which it reflects upon the person's character or shows him to be unworthy to remain in

the ranks of an honourable profession . . . the likelihood or otherwise of a repetition of such conduct and the nature and the need to protect the public.'

[16] In *the Law Society of the Northern Provinces v Mabaso* (20252/14) [2015] ZASCA 109 (21 August 2015) para 14 this court held, with reference to *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA) at 537F-G, that in exercising its function in respect of the third enquiry, namely, considering what sanction should be visited on the person, the court is called upon to exercise a strict discretion which means that this court, on appeal has a limited power. It can only interfere if the discretion was not exercised judicially. In other words, this court can only intervene where the high court is found to have exercised its discretion capriciously, or upon a wrong principle or where it has not brought its unbiased mind to bear on the question.[2]

[17] In arriving at the sanction ultimately imposed, namely the striking off, the high court took account of the fact that the appellant's transgressions were very serious and their seriousness was exacerbated by his apparent lack of insight into the seriousness of his shortcomings, and the fact that he did not take the court into his confidence.

[18] It was submitted on behalf of the appellant that in the absence of a finding of dishonesty on the part of the appellant, the high court should not have ordered his striking off, but should have ordered that he be suspended from practice. The appellant relied on *Summerley* for this proposition. In *Summerley* (para 21) the following was said regarding the absence of dishonesty and its effect on the penalty to be imposed:

'The further argument on behalf of the appellant was that, as a general rule, striking-off is reserved for attorneys who have acted dishonestly, while transgressions not involving dishonesty are usually visited with the lesser penalty of suspension from practice. Although this can obviously not be regarded as a rule of the Medes and the Persians, since every case must ultimately be decided on its own facts, the general approach contended for by the appellant does appear to be supported by authority... This distinction is not difficult to understand. The attorney's profession is an

[2] *Malan* para 13.

honourable profession, which demands complete honesty and integrity from its members. In consequence dishonesty is generally regarded as excluding the lesser stricture of suspension from practice, while the same can usually not be said of contraventions of a different kind.'

But this court made it clear in *Malan*, (para 10) that where dishonesty has not been established a court has to exercise a discretion within the parameters of the facts of the case without any proclaimed limitations.

[19] In *Summerley* this court ordered a suspension from practice rather than striking-off. There the appellant had fully explained the reasons for the shortfall in the trust account concerned. In the present case the appellant proffered a far-fetched explanation for his failure to pay to the department the interest accrued on the funds it had instructed him to invest on its behalf. He relied on a contrived agreement to justify his omission. It is apparent from the conversation that the appellant had with Ms Sefalo, which the appellant secretly recorded, that at the time he was more worried about a Law Society investigation and the effect it probably would have on his reputation should it proceed. For this reason he did not want to come clean. As regards the deficit in his trust account, again the appellant sought to defend it by advancing defences that were clearly untruthful.

[20] He attacked the findings in Swart's report on the ground that they were based on insufficient information. But the attack is without any basis, if regard is had to the fact that the appellant's own auditor found that there was a shortage in the appellant's trust accounts. Secondly, the suggestion that some of the firm's accounting records were corrupted when the computer in which they were stored, was struck by lightning in November and December 2013, cannot be correct if proper regard is had to the following facts. Swart's inspection which was carried out in March/April 2014 was confined to the period 1 March 2012 to 14 October 2013. In his report Swart stated that as at 14 October 2013 the shortage in the appellant's trust account was R10 561 599.37. This means that the shortage in the appellant's trust account was already in existence when the alleged lightning strikes occurred. Swart's report contains no mention of any difficulty with the accounting records

occasioned by a lightning strike. It is therefore clear that the appellant's explanations for failing properly to keep his accounting records, were untruthful. This conduct, in itself, is wholly inconsistent with the appellant's duties as an officer of the court, which demand complete honesty and integrity.

[21] In any event the premise underpinning this argument is fallacious. While the high court made no express finding of dishonesty, the actions of the appellant in taking R20 million from the funds that he was obliged to invest in a s 78(2A) trust account for the benefit of the department can only be characterised as theft of trust money. No lawful justification has been proffered for taking this money. The appellant was clearly guilty of dishonesty.

[22] It follows therefore that the high court did not misdirect itself in the exercise of its discretion when it ordered the striking off of the appellant's name from the roll of attorneys and conveyancers.

[23] In the result the following order is made:
The appeal is dismissed with costs and such costs to be taxed on the scale of attorney and client.

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D H Zondi
Judge of Appeal

Appearances

For the Appellant:	A J Murphy (with him J A Klopper) Instructed by: Spies Bester Potgieter Attorneys, Pretoria Symington & De Kock Attorneys, Bloemfontein
For the Respondent:	C Tshavhungwa (with him Ms S L Magardie) Instructed by: Damons Magardie Richardson Attorneys, Pretoria Phatshoane Henney Attorneys, Bloemfontein