THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 50/08

CONRI BOTHA **First Appellant**
NICOLAAS DANIËL DE JONGH **Second Appellant**
CORNELIUS LABUSCHAGNE **Third Appellant**

and

THE LAW SOCIETY OF THE NORTHERN PROVINCES **Respondent**

Neutral citation: *Botha v Law Society* (50/08) [2009] ZASCA 13 (19 March 2009)

Coram: MPATI P, BRAND, CLOETE, PONNAN and SNYDERS JJA

Heard: 19 FEBRUARY 2009

Delivered: 19 MARCH 2009

Summary: Attorney – books of account chaotic – touting for work – unfit to practise – struck from the roll

ORDER

On appeal from: High Court, Pretoria (Pretorius J and Raulinga AJ sitting as court of first instance).

1. The appeal is dismissed.

2. The counter-appeal is upheld and the appellants are ordered, jointly and severally, to pay the costs of the appeal and the counter-appeal on the scale as between attorney and client, including the costs of two counsel.

3. The order of the court a quo is set aside and replaced by the following:

   'a The names of the first, second and third respondents are struck from the roll of attorneys.

   b The names of the first and second respondents are struck from the roll of conveyancers.

   c The respondents are ordered to hand their certificates of enrolment as attorneys and conveyancers to the registrar of the court a quo.

   d In the event of any of the respondents failing to comply with this order within two weeks the deputy sheriff of the area where these certificates are, is authorised and requested to forthwith attach the certificates and hand them over to the registrar of the court a quo.

   e The respondents are ordered, jointly and severally, to pay the costs of the application, including the costs of the application on 6 August 2004, on the scale as between attorney and client, which costs are to include the qualifying fees of Mr L Marais.'

4 The period in para 3d will run from the date of this order.

JUDGMENT

SNYDERS JA (MPATI P, BRAND, CLOETE, PONNAN JJA concurring)

[1] All three appellants are attorneys and the first and second appellants are also conveyancers. They practised in partnership under the name De Jongh & Pienaar (the firm) until they were suspended[1] from practice for a period of two years by an order of the Pretoria High Court.

[2] The appellants appeal against this order and seek a suspension of the high court order on suggested conditions. They contend that the court a quo, due to factual misdirections, incorrectly concluded that they are not fit and proper persons to practise as attorneys and/or conveyancers and imposed a penalty that is excessive in the circumstances. They seek the following order on appeal:

'1. That the Appellants are found to be fit and proper individuals to continue practising as attorneys and conveyancers;

2. That the Appellants are fined an amount of R50 000.00 (fifty thousand rand);

3. That the Appellants are suspended from practising as attorneys and conveyancers for a period of 6 (six) months which suspension is wholly suspended for a period of 3 (three) years on the condition that the Appellants are not found guilty by a disciplinary committee or other competent functionary of any transgressions of the rules of the Respondent concerning the management of their financial affairs.'

[3] The respondent, in a counter-appeal, supports the finding that the appellants are not fit and proper persons to practise, but contends that the trial court erred in the exercise of its discretion by imposing the penalty that it did as it should have struck the appellants from the roll of attorneys and, in the case of the first two appellants, the roll of conveyancers.[2]

[1] Their suspension followed an application brought by the respondent in terms of s 22 of the Attorneys Act 53 of 1979, which provides: 'Any person who has been admitted and enrolled as an attorney may on application by the society concerned be struck off the roll or suspended from practice by the court within the jurisdiction of which he practises . . . if he, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney.'

[2] In terms of s 18(1) of the Act one has to be an attorney in order to be a conveyancer.

[4] Section 22(1) of the Attorneys Act 53 of 1979 (the Act) prescribes a three-stage inquiry, as was summarised in *Jasat v Natal Law Society* 2000 (3) SA 44, [2000] 2 All SA 310 (SCA) at 51C-H:

'First, the Court must decide whether the alleged offending conduct has been established on a preponderance of probabilities. . . . The second inquiry is whether, as stated in s 22(1)(d), the person concerned "in the discretion of the Court" is not a fit and proper person to continue to practise. . . . The third inquiry is whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order suspending him from practice for a specified period will suffice.'

[5] The first stage of the inquiry involves a purely factual finding whereas both the second and third stages involve the exercise of a discretion, which can only be interfered with on appeal when the court of first instance did not exercise its discretion judicially.[3] The findings of the court a quo in respect of the first stage were largely common cause and not contentious in this appeal. In relation to the second stage of the inquiry the appellants rely on several alleged misdirections by the court a quo. The respondent on the other hand does not challenge the conclusion arrived at by the court a quo in the second stage of the inquiry, but the facts relied on in its challenge to the penalty imposed are relevant to the findings at the second stage. I will therefore accept in favour of the appellants that there were misdirections that justify this court to reconsider the conclusions reached at the second stage of the inquiry.

[6] The respondent brought the application against the appellants on the strength of three different categories of conduct complained of: first, that the books of account kept by the appellants reflected a trust shortage in excess of R12m;[4] second, that the appellants were touting for work;[5] and third, that numerous of the appellants' clients and some colleagues raised complaints of

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[3] *Jasat* at 51E-I; *Malan v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) para 13 and *Botha v Law Society, Northern Provinces* 2009 (1) SA 227 (SCA) para 3.

[4] This conduct was alleged to be in breach of s78 of the Act and rules 68 and 69 of the respondent's rules.

[5] In contravention of rule 89.1.

unprofessional and dishonourable conduct[6] by the appellants in their relationships with clients and colleagues. There is little, if any, dispute on the facts that constitute the complaints, but much dispute as to the inferences to be drawn therefrom.

[7] The respondent instructed Mr L Marais (Marais), a chartered accountant, to investigate the financial records of the appellants. He compiled three reports on his findings. Those reports revealed that the appellants' books of account were not properly kept, nor up to date and contained mistakes on a large scale, and further revealed that incorrect procedures were followed; the trust account did not accurately reflect the trust position of the firm;[7] by June 2004 no trust determination had been done for a period of 15 months;[8] the firm's bank reconciliation was incorrectly done; there were numerous mistakes in the ledger of the firm's trust creditors; the interest on the trust account had not been paid over to the respondent for several months;[9] in respect of 95 payments from the appellants' business account there was no source documentation and in respect of five payments to estate agents (relevant to the charge of touting) the appellants had at no stage tendered an explanation. It should be noted, however, that the case against the appellants never included an allegation that they appropriated trust funds for their personal benefit.

[8] All three appellants have at all times acknowledged, rightly, that they have failed in their obligations, jointly and individually, to keep proper books of account in compliance with the Act and the rules. Their explanation for the state of the books of account of the firm is that the firm expanded beyond expectation. In the result, they say, they had to implement a new accounting software package and make additions to their office building which apparently caused numerous power failures which, in turn, caused the new software to

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6 In contravention of various sub-rules of rule 89 including 89.15, 89.16 and 89.23.
7 In contravention of rules 68.1, 68.5 and 69.3.
8 In contravention of rule 69.7.1.
9 In contravention of s 78(3) of the Act.

lose data.[10] In addition they explain that their regular bookkeeper went on maternity leave and shortly after her return resigned from her employment.

[9] These explanations do not in any way address the total lack of control, dereliction of duty and irresponsibility on the part of the appellants. In fact, no explanation has at any stage been tendered for that. On the contrary, the appellants persistently denied that their books were in a chaotic state and termed this finding by the court a quo as factually incorrect and unfair, particularly as they kept financial records pertaining to each case on the file cover relating to that case.

[10] No practitioner should be at a loss as to what is expected of him or her when it comes to the keeping of proper accounts. The Act and the rules of the respondent spell this out and the courts have repeatedly explained the requirements in the following terms:[11]

'The rule thus obliges attorneys to keep proper records and books of account in accordance with generally accepted accounting practice and procedure containing a full and accurate record of all financial transactions and distinguishing in readily discernible manner between trust account and business account transactions. An undigested mass of figures from which it may be possible to find out something (or, indeed, everything) about the condition of the trust account is not keeping proper books in a business sense. It is no answer to say 'I have no bookkeeper or my accountant is too busy'. If any attorney cannot deal properly with a matter he must not undertake it. This is an absolute rule; it has to be so – the public is at risk. Thus it is so that the particulars and information of trust moneys must be contained in the narrative of the entries of the books of account and it should not be necessary to resort to documents and files to obtain such information.'

[11] The appellants' books of account were totally incompatible with the requirements of the profession and to describe this situation as chaotic is appropriate. The appellants' persistence to the contrary shows a lack of

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[10] The court a quo benevolently accepted this explanation despite the fact that the appellants never introduced any expert evidence to support the allegations of the failure of the software package. They only annexed an unattested letter from the supplier of the software package, who did not qualify himself to express an opinion. The letter merely indicates that interruptions in power supply may cause data to be lost.

[11] *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T) at 394G-I; See also *Incorporated Law Society, Transvaal v Visse; Incorporated Law Society, Transvaal v Viljoen* 1958 (4) SA 115 (T) at 123F.

insight and responsibility. When the urgent application was brought, the firm's books showed a trust shortage of R12m and by the time the appellants filed their last affidavit the trust account showed a trust surplus.

[12] Some details of the books of account require closer scrutiny, as these not only confirm the chaotic state of the books but expose the appellants' denial of touting for work as dishonest. When Marais investigated the books for the second time he discovered three tax invoices issued to the firm by an estate agent, Stefprop Eiendomme. The items on the invoices were for a sponsorship in the amount of R2 000 and several smaller amounts with a 't' or 'v' inscribed next to them. It was common cause that these abbreviations referred to a transfer (transport) or a bond (verband) to be registered by the appellants. On one of these invoices, number 44, the amounts for transfers, bonds and the R2 000 sponsorship is totalled at R5 834.96. It contains an additional total of R4 500. At the foot of the invoice, in manuscript, the number #22420 is written. Marais suspected this to be the number of one of the firm's cheques. He could not find such a cheque but suggested in his report that it was probably given in payment to Stefprop Eiendomme, for the registration of property transfers and mortgage bonds referred to the firm.

[13] The appellants denied Marais' inference and tendered the following explanation in a supplementary answering affidavit deposed to by the second appellant on behalf of all of them:

'51.1 Ek ontken dat die Respondente 'kickbacks' of direkte betalings gemaak het vir die verwysing van opdragte deur Stefprop Eiendomme na die firma.

51.2 Soos ek verduidelik het in paragraaf 42.5 van my Beantwoordende Beëdigde Verklaring is 'n maatskappy met die naam van Red Lager (Edms) Bpk gestig om agentekommissie op 'n voorskot basis teen 'n bepaalde rentekoers aan eiendomsagente uit te betaal. My eggenoot asook die Derde Respondent se eggenoot, is direkteure van Red Lager (Edms) Bpk en is ook die enigste aandeelhouers in hierdie maatskappy.

51.3 Op hierdie basis het Red Lager die kommissie op verskeie transaksies van Mnr. Heinrich Strydom van Stefprop Eiendomme voorgeskiet. Sommige van hierdie transaksies het egter platgeval, en was Strydom 'n bedrag van ongeveer R60 000-00 aan Red Lager verskuldig, welke bedrag hy nie kon terugbetaal nie. Omdat Stefprop Eiendomme, en meer spesifiek Strydom, op daardie stadium alreeds 'n geruime tyd

oordragte na die firma verwys het, en die feit dat Strydom 'n ongerehabiliteerde insolvent was, het die Derde Respondent en ek ons eggenote oortuig om nie teen Strydom stappe te neem nie, en het Strydom onderneem om voort te gaan om verder oordragte na die firma te verwys, in 'n poging om ten minste tot 'n mate te vergoed vir die verlies wat ons eggenote gely het.

51.4 Die brief en fakture waarna die Applikant verwys, is bloot aan die firma gestuur as 'n aanduiding van die waarde van werk wat Strydom na die firma verwys het. Ek noem ook dat Strydom 'n motorfiets aan my en die Derde Respondent gegee het om sy verskuldigheid te delg.[12]

51.5 Ek wens ook te verklaar dat Strydom die outeur van hierdie fakture was, en dat hierdie fakture nooit aan die firma gerig was op my of die Derde Respondent se aandrang nie. Ek voer met eerbied aan dat Strydom se keuse van die boekstaaf van die waarde van transaksies wat hy verwys het sy metode was.

51.6 In die fakture verwys Strydom na 'borgskappe'. Op die stadium voordat ons die praktyk van borgskappe gestaak het, het ons ook van tyd tot tyd vir Strydom geborg. Op sy versoek het hy die waarde van sulke vorige borgskappe ook in ag geneem sonder dat ons dit ooit betaal het.

51.7 Ten tye van Marais se ondersoek het ek en Marais saam gepoog om 'n verband tussen die bedrae en die fooie wat die firma op hierdie transaksies verdien het, te vind en was dit vir ons en hom onmoontlik om dit te doen.

51.8 Ek verklaar onomwonde dat die firma nooit enige geld aan Strydom oorbetaal het nie. Ek kan net noem dat Strydom inderdaad steeds oordragte na die firma verwys.' (My emphasis.)

[14] Aside from the fact that this explanation itself amounts to an admission of touting,[13] its significance for the current discussion is that the appellants emphatically denied that they had made any payment on these invoices. A challenge addressed to the appellants on the non-availability of the cheques that the invoices refer to, and therefore the absence of corroboration for their version, prompted two cheques to be annexed by them to a further supplementary answering affidavit. One is a business cheque, number 02242 and one a trust cheque, number 36161. Cheque 02242 is made out by the firm in favour of De Jongh Ontwikkeling in the amount of R5 834.96, the same

[12] Upon reading about the creation of Red Lager in the appellants' affidavit the suspicion arises that the distinction between the firm on the one hand and Red Lager on the other hand is an artificial one, confirmed by these allegations that a debt owed to Red Lager was paid by way of a donation of a motorcycle to two partners of the firm.

[13] On the appellants' own version they caused a financial benefit to accrue to Stefprop Eiendomme by preventing Red Lager, their wives' company, from enforcing a debt against Stefprop Eiendomme in return for work being referred to their firm by the latter.

as the first total on invoice 44. Cheque 36161 is made out by the firm in favour of De Jongh Ontwikkeling in the amount of R4 500, the same as the second total on invoice 44. The explanation that accompanies the two cheques is that it serves as proof that value was attached to the work referred by Stefprop Eiendomme to the applicant in settlement of the debt owed to Red Lager and De Jongh Ontwikkeling.

[15] These cheques undeniably support the inference originally drawn by Marais and belie the appellants' explanation that they made no payment on the strength of these invoices. Only one conclusion is possible: the appellants were telling blatant untruths, not only about making payments on these invoices on behalf of Stefprop Eiendomme to its creditor, but about never having paid for work referred to them. The suggestion in argument that the denial in para 51.8 of the appellants' supplementary answering affidavit (quoted at the end of para 13 above) is factually correct inasmuch as payments were not made to Strydom but to a creditor of his firm, Stefprop Eiendomme, if accepted, compounds the problem as this would constitute a deliberate half-truth intended to mislead.

[16] Further to the complaint of touting, the appellants made several payments to estate agents for which they could not provide source documentation to substantiate their denial that it was for work referred to them. They never explained the reason for 5 of these payments. These unsubstantiated payments to estate agents were posted in the ledger to 'bad debts', 'drawings' and 'miscellaneous office expenses' indicating an intention to hide and deceive which justifies the inference that the appellants were dishonest in their bookkeeping and in their explanation to the court. In view of the conclusions about the dishonesty of the appellants there is no need to consider whether payments by the appellants of expenses for advertising, business cards and the like made to or on behalf of estate agents under the guise of sponsorships and entertainment amounted to touting.

[17] The appellants' approach to the complaint that they touted for work was disgracefully cavalier. Their response when the lack of an explanation for

some payments to estate agents was pointed out was that they could surely do as they pleased with money in their business account. An enquiry by Marais as to how they would deal with an SARS investigation in the absence of source documentation was met with a shrug of the shoulders. In general terms they labelled the respondent's rules on touting, advertising, entertainment and sponsorships vague and out of touch with modern reality. The complaint they faced was not for advertising or entertainment, but affording direct benefits to estate agents in the form of 'kickbacks. Accordingly their complaint of lack of clarity of rules with regard to the former amounted to a deliberate attempt to avoid the complaint.

[18] The iniquity of an attorney being dishonest is self-evident.[14] The degree of disclosure and openness required of an attorney in proceedings of this nature has been stated repeatedly. In *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 853G-H it was eloquently stated as follows:

'Uit die aard van die dissiplinêre verrigtinge vloei voort dat van 'n respondent verwag word om mee te werk en die nodige toeligting te verskaf waar nodig ten einde die volle feite voor die Hof te plaas sodat 'n korrekte en regverdige beoordeling van die geval kan plaasvind. Blote breë ontkennings, ontwykings en obstruksionisme hoort nie tuis by dissiplinêre verrigtinge nie.'[15]

[19] The appellants sought refuge in the principles established in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)* and urged the court to accept their denials of the respondent's allegations against them. In view of the conclusions reached above their denials are so clearly untenable that they were rightly rejected on the papers.

[20] On these facts alone, and without the need to delve into the individual complaints, the conclusion is inevitable. The court a quo was correct in concluding that the appellants are not fit and proper persons to practise.

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[14] Insofar as authority is necessary for this proposition it is well stated in *Matthews* at 395F-396H.

[15] See also *Matthews* at 395F-396H.

[21] In respect of the third leg of the inquiry the appellants persisted in the argument that their suspension from practice should be suspended. The contention is illogical. As explained in *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA) at 16D-G:

'The suspension of his suspension from practice [by the court a quo] is entirely incompatible with the finding that he was not a fit and proper person to continue practising and resulted in the anomalous situation that a person who had explicitly been pronounced unfit to do so, was allowed to continue his practice. (Logically, a striking-off order or an order of suspension from practice should be suspended only if the Court finds that the attorney concerned is a fit and proper person to continue to practice but still wishes to penalise him.)'.[16]

[22] At this stage of the inquiry the function of the court is primarily to protect the public rather than punish the appellants.[17] This was overlooked by the court a quo. It focused instead on aggravating and extenuating features as if it were imposing sentence. In addition the court a quo found that the appellants gave their full cooperation in the investigation of the case against them. This is not so. Their dishonesty is but one fact, albeit the most important, that militates against that finding.

[23] The appellants have been dishonest, have shown a lack of integrity and openness and have shown no insight into the extent of their transgressions. An attorney should not have these character traits. An order suspending them from practice would only be appropriate if there was some way in which the court could expect them to overcome these character traits during the time of their suspension. It is simply impossible to look into the future and know that the public would be adequately protected after a period of suspension. Hence the logical and sensible approach must be that the appellants be prevented from practising until they can convince a court that they have in fact reformed to the point that they could be allowed to practise again.[18]

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[16] See also *Malan* at 221D.
[17] *Malan* para 7.
[18] *Malan* para 8.

[24] It was argued that the court should take into account that the appellants have since completed the bookkeeping course that the court a quo ordered them to complete, that they have disbanded their practice and that they have, for the past year, been employed as professional assistants with other firms of attorneys. Although it is appropriate to take facts subsequent to the sanction imposed by the court a quo into account, in appropriate circumstances,[19] none of the facts mentioned redeems the appellants or provides protection for the public.

[25] In what can only be described as desperation this court was asked for the first time in closing argument on behalf of the appellants to differentiate between them in the order it makes. No motivation was tendered other than that they differ in age and had been partners in the firm for different periods of time. The respects in which the court should differentiate was not suggested nor did the respondent have an opportunity to put facts before the court to counter this argument. The appellants aligned themselves in their opposition at all relevant times in the conduct of their case. All their affidavits show that they chose to speak from one mouth and never distinguished between themselves on any basis whatsoever. The contention has no merit.

[26] Counsel for the parties were in agreement that the court a quo overlooked the need to include the qualifying fees of Marais in the costs order made and that this court should correct the omission.

[27] The appellants, rightly, tendered the costs in the court a quo and on appeal on the scale as between attorney and client, including the costs of two counsel, regardless of the outcome of the appeal.

[28] The following order is made:

1. The appeal is dismissed.
2. The counter-appeal is upheld and the appellants are ordered, jointly and severally, to pay the costs of the appeal and the counter-

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[19] *Botha* para 16.

appeal on the scale as between attorney and client, including the costs of two counsel.

3. The order of the court a quo is set aside and replaced by the following:

'a The names of the first, second and third respondents are struck from the roll of attorneys.

b The names of the first and second respondents are struck from the roll of conveyancers.

c The respondents are ordered to hand their certificates of enrolment as attorneys and conveyancers to the registrar of the court a quo.

d In the event of any of the respondents failing to comply with this within two weeks the deputy sheriff of the area where these certificates are, are authorised and requested to forthwith attach the certificates and hand them over to the registrar of the court a quo.

e The respondents are ordered, jointly and severally, to pay the costs of the application including the costs of the application on 6 August 2004, on the scale as between attorney and client, which costs are to include the qualifying fees of Mr L Marais.'

4 The period in para 3d will run from the date of this order.

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S SNYDERS
JUDGE OF APPEAL

Appearances

For Appellants:	B P Geach SC J Vorster
Instructed by:	Stuart Van der Merwe Inc, Pretoria McIntyre & Van der Post, Bloemfontein
For Respondent:	A A Louw SC H J L Vorster
Instructed by:	Rooth Wessels & Maluleke, Pretoria Naudes Bloemfontein