THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 1151/2017

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES **APPELLANT**

and

PULE ABRAM MOROBADI **RESPONDENT**

Neutral citation: *The Law Society of the Northern Provinces v Morobadi* (1151/2017) [2018] ZASCA 185 (11 December 2018)

Coram: Navsa ADP, Mbha, Zondi, Molemela and Makgoka JJA

Heard: 21 November 2018

Delivered: 11 December 2018

Summary: Attorney – application for removal from roll of attorneys – attorney administering deceased estate allegedly improperly charging a fee pursuant to a contingency fee agreement –admitted unauthorised 'loan' from estate bank account – further allegations of fraudulent conduct -whether the high court misconstrued its role under s 22(1)(d) of the Attorneys Act – whether interim suspension order appropriate to protect interests of the public pending full investigation.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Molopa-Sethosa J and Nochumsohn AJ sitting as court of first instance):

1 The appeal is upheld to the extent reflected in the order set out below;

2 The order of the high court is set aside and is replaced with the following:

'(a) The respondent is, as an interim measure suspended from practising as an attorney pending a disciplinary enquiry concerning his professional conduct;

(b) The relief sought in prayers 2 up to 8.3, 9, 10.1, 10.2, 10.3, 10.4, 10.5, 11 and 12 of the notice of motion dated 12 January 2016 is hereby incorporated in this order;

(c) The enquiry referred to in (a) above must be instituted and finalised within 3 (three) months from the date of this judgment;

(d) The application for the removal of the respondent's name from the roll of attorneys pending the finalisation of the enquiry referred to in (a) above, is postponed;

(e) The parties may supplement their papers, if so advised, on the matters emanating from the enquiry.

(f) Costs are reserved.'

3 No order is made as to costs.

JUDGMENT

Zondi JA (Navsa ADP, Mbha, Molemela and Makgoka JJA concurring)

[1] The appellant, the Law Society of the Northern Provinces (the Law Society) launched an application in the Gauteng Division of the High Court, Pretoria (the high court) in terms of s 22(1)(d) of the Attorneys Act, 53 of 1979 (the Act) seeking an

order that the respondents' name be removed from the roll of attorneys. The high court (Nochumsohn AJ, Molopa-Sethosa J concurring) dismissed the application and ordered each party to pay its own costs.

[2] The Law Society appeals against those 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 leave of this court.

[3] Section 22(1)(d) of the Act provides that any person who is admitted and enrolled as an attorney may, on application by the Law Society, 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. I consider it necessary to begin by setting out the nature of the proceedings under s 22(1) of the Act and the manner in which they should be dealt with.

[4] Applications for the striking off of an attorney's name from the roll of practitioners are not ordinary civil proceedings, they are proceedings of a disciplinary nature and are sui generis.[1] In *Solomon v Law Society of the Cape of Good Hope* 1934 AD 401 at 408-409 the following was said regarding the nature of disciplinary proceedings:

'Now in these proceedings the Law Society claims nothing for itself. . . It merely brings the attorney before the Court by virtue of a statutory right, informs the Court what the attorney has done and asks the Court to exercise its disciplinary powers over him. . . The Law Society protects the interests of the public in its dealings with attorneys. It does not institute any action or civil suit against the attorney. It merely submits to the Court facts which it contends constitutes unprofessional conduct and then leaves the Court to determine how it will deal with this officer.'

[5] 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.[2] 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

[1] *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T) at 393D-E.
[2] *Malan & another v Law Society of the Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 (SCA) para 4.

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.[3] In S*ummerley*[4] the following was said:

'the exercise of the discretion at the second stage "involves, in reality, a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, a value judgment" . . . 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 penalty of being struck from the roll or whether an order of suspension from practice will suffice.'

[6] The application came to light as a result of the report that was filed by Mr Reddy – a Chartered Accountant and Auditor in the employ of the Law Society's Monitoring Unit - following an inspection he conducted at the respondent's firm. During 2015 two complaints of unprofessional conduct were lodged against the respondent with the Law Society. One was lodged by Haasbroek & Boezaart Attorneys on behalf of Dr Kgarume on 2 March 2015. This complaint had three components. The complaint was that the respondent, on 14 May 2010, was instructed by Dr Kgarume to attend to the administration of the estate of the late France Ponky Kgarume under a special power of attorney. Dr Kgarume alleged, firstly, that the respondent purportedly concluded a contingency fee agreement with her for the purpose of winding-up the deceased estate. Pursuant to the purported contingency fee agreement, the respondent charged Dr Kgarume 15 per cent on the gross asset value of R835 652.99 of the estate, which she contended was in excess of 3.5 per cent of the gross value of the estate which is the prescribed tariff in terms of s 51 (1)(b) of the Administration of Estates Act 66 of 1965. I must point out that the actual amount charged by the respondent was R67 726.80 which is 50 per cent of what he had stipulated in the contingency fee agreement.

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[3] *Summerley v Law Society, Northern Provinces* [2006] ZASCA 59; 2006 (5) SA 613 (SCA) para 2 and the cases there cited.
[4] Ibid at 615E-F.

[7] Secondly, the complainant alleged that contrary to s 51(4) of the Administration of Estates Act the respondent transferred funds from the estate bank account to his business account, before the estate was distributed and without the authority of the Master of the High Court. Thirdly, the complaint related to an amount of R48 000 the respondent took as a 'loan' from the estate bank account without the authority of the executor.

[8] Pursuant to Dr Kgarume's complaint, Ms Jalo Herholdt of the Law Society Disciplinary Department on 19 March 2015 requested that an inspection of the respondent's financial records be authorised. Authority for the inspection was given by Mr Van Staden on 5 May 2015 and thereafter Mr Reddy was instructed to inspect the respondent's firm's financial records, which he did on 9 and 25 June 2015.

[9] Mr Reddy on 30 July 2015 furnished the Law Society with a report in which he recorded his findings. In his report Mr Reddy dealt with the allegations relating to mismanagement by the respondent of the estate of the late France Ponky Kgarume.

[10] Apart from conducting an investigation arising from Dr Kgarume's complaint, Mr Reddy also inspected, among others, the trust ledger account of DK Manganya, a client of the respondent, although it did not form the subject matter of any complaint. Mr Reddy noted that the respondent had received an amount of R1 352 780 on 5 June 2014 and a further amount of R103 781.59 on 25 June 2014 from the Road Accident Fund on behalf of Mr Manganya. An amount of R591 976.59 was paid into the respondent's business banking account.

[11] When approached for an explanation regarding these entries the respondent informed Mr Reddy that he had entered into a contingency fee agreement with Mr Manganya and that in terms of that agreement the respondent was entitled to fees which equated to 25 per cent of the capital award. Mr Reddy inspected the statement of account prepared by the respondent for Mr Manganya, from which it appeared that the respondent had charged Mr Manganya a fee amounting to R338 195, which amounts to 25 per cent of the capital awarded by the Road Accident Fund. In

addition, the respondent also retained the party and party costs recovered from the Road Accident Fund which amounted to R103 781.59.

[12] The statement of account also reflected an amount of R150 000 received by the respondent from Mr Manganya. When the basis for the payment was queried with the respondent, his response was that Mr Manganya had thought it necessary to pay him extra as a gesture of gratitude and the respondent produced a letter from Mr Manganya, which purported to give him permission to do so.

[13] Mr Reddy's conclusion was that the respondent had contravened the provisions of the Act and / or the Rules of the Law Society relating to the keeping and maintaining of accounting records and the obligation to ensure that at any given time the trust balances do not exceed trust monies and trust accounts do not have debit balances. He recommended that his report be referred to the Disciplinary Department. He was, however, of the opinion that the firm did not pose a significant risk to trust creditors or the Attorneys Fidelity Fund.

[14] In the meantime and on 23 July 2015 the Law Society received a complaint from the Gauteng Department of Human Settlements (the department) about the respondent's conduct that he had refused to meet with the department. The gist of the complaint was that Mr Radebe, the Deputy-Director of its Anti-Fraud and Corruption Unit had asked for a meeting with the respondent in order to conduct a review of the work done by him and the payments that were made by the department to him for work that he had performed on its behalf. The department had paid him R1 865 969 as fees but it could not find underlying documentation. He refused to meet with Mr Radebe. This formed the basis of the second complaint.

[15] On 21 August 2015 the respondent sent an email to the Law Society to which was attached his letter dated 12 August 2015 and a letter dated 21 August 2015 from Ms Gomba, a senior legal adviser in the department. The purpose of this correspondence was to persuade the Law Society to withdraw the complaint because the dispute giving rise to it had allegedly been resolved between the parties.

[16] On 7 September 2015 Mr Radebe informed the Law Society that the department had suspended Ms Gomba for, among others, her response to the Law

Society and that it was still pursuing its complaint, which at that stage was the respondent's refusal to meet with the department.

[17] Pursuant to this notification, Mr Radebe and Ms Makhetha both from the department's Anti-Fraud and Corruption Unit met with the Law Society on 19 November 2015. At the meeting they furnished the Law Society with the outcome of the investigation into payments made by the department to the respondent for services the respondent allegedly rendered on behalf of the department. In short, the findings of the Anti-Fraud and Corruption Unit are that Ms Gomba colluded with the respondent's firm to defraud the department in an amount of R1 687 844 and submitted for payment, invoices amounting to R1 226 194.40 for work the respondent had not done. The Anti-Fraud and Corruption Unit recommended that the State Attorney be instructed to recover R1 687 844 from Ms Gomba and the respondent. This report was not confirmed by a confirmatory affidavit.

[18] On 6 November 2015 and before the meeting between the Law Society and Mr Radebe took place, Ms Herholdt recommended to the Council of the Law Society that an application be brought to have the respondent's name removed from the roll of attorneys as a result of the complaint by Dr Kgarume regarding the handling of the estate and arising out of his handling of DK Manganya's matter. In other words, the recommendation of Ms Herholdt to Council that the application be brought for the removal of the respondent's name from the roll was based on the findings made by Reddy in his report relating to Dr Kgarume's complaint and the Manganye matter. This is what served before Council and was considered by it on 27 November 2015.

[19] In relation to the department's complaint, which did not form the basis of Ms Herholdt's recommendation, the Disciplinary and / or Investigating Committee of the Law Society on 24 November 2015 recommended that the respondent be summoned to appear before the Disciplinary Committee to answer fraud allegations against him by the department. In other words, the department's complaint was going to be dealt with through the disciplinary committee process. Understandably so, because of the egregious nature of the alleged conduct. That enquiry did not take place.

[20] Following the Council resolution of 27 November 2015 the Law Society, on 24 February 2016, instituted motion proceedings in the high court against the

respondent, seeking an order that his name be removed from the roll of attorneys. This was based on the allegations of the respondent's professional misconduct arising from Dr Kgarume's complaint, Gauteng Department of Human Settlements complaint and irregularities which were discovered by Mr Reddy when he reviewed Mr Manganya's trust ledger account. It also included the complaint by the department concerning the fraud allegedly perpetrated against it by the respondent.

[21] The respondent opposed the application and also raised technical defences. He contended that the Law Society had to be non-suited because of its failure to follow its own procedures relating to conducting disciplinary proceedings. He submitted that the Law Society should have referred the complaints to the Disciplinary Committee as recommended by the Investigating Committee. He argued that the Law Society's failure to comply with its own internal processes rendered its application for his removal unlawful.

[22] The rules which the respondent alleged the Law Society ignored are those that were made under s 74(1) of the Act and promulgated in Government Gazette No 7164 of 1 August 1980 as amended by Government Gazette No 33050 of 25 March 2010. The rules relating to disciplinary proceedings are contained in Part XIII of the Rules. In terms of rule 95(2), upon receipt of a complaint the council may where it is of the opinion that a prima facie case of unprofessional or dishonourable or unworthy conduct on the part of the practitioner has been made out, furnish the practitioner with particulars of the complaint and call upon him to furnish the council in writing with his or her explanation in response to the complaint. Alternatively, the council may call upon the practitioner to appear before an investigative committee to discuss the matter. This committee may, after considering the complaint and the practitioner's explanation decide either to dismiss the complaint or issue a written warning to the practitioner.

[23] If the council is of the opinion that there is a prima facie case of unprofessional conduct to answer, it may call upon the practitioner to appear before a formal disciplinary enquiry.

[24] In circumstances where the practitioner is convicted of a charge and it is sought to have him or her suspended from practice or struck from the roll, the provision of rule 101 is invoked. This rule provides:

'101.1 Should an enquiry be held before a committee appointed by the council in terms of Section 67 of the Act, and at the conclusion of the enquiry, the practitioner be found guilty of unprofessional, or dishonourable or unworthy conduct, in terms of Section 72 of the Act, the committee may impose any punishment in respect thereof which is permitted in terms of Section 72 of the Act; provided that if at any stage during the enquiry, the committee is of the opinion that the conduct of the practitioner is such as to warrant an application by the society in terms of the Act for suspension from practice or the striking from the roll of the practitioner, it shall:

101.1.1 as soon as possible submit a written report on its findings to the council, together with its recommendations regarding the suspension from practice or the striking from the roll of the practitioner;

101.1.2 at the same time deliver a copy of its report and recommendations to the practitioner and call upon the practitioner to furnish the council with representations in writing, within such period as the committee considers reasonable, but in an event within not less than seven days, why application should not be made for suspension from practice, or as the case may be, for the striking from the roll of the practitioner.

101.2 On receipt of the report and written recommendations of the committee, in terms of rule 101.1.1, and the written representations of the practitioner, in terms of rule 101.1.2, the council shall consider the matter and shall:

101.2.1 if it shall decide to proceed with an application for suspension from practice or for striking from the roll, advise the practitioner accordingly and take such further steps as may be necessary in that regard; or

101.2.2 if it shall decide not to proceed with an application for suspension from practice or for striking from the roll, refer back to the committee, together with a copy of the written representations of the practitioner, for the committee to dispose of as it sees fit; or

101.2.3 if it considers it appropriate, call upon the practitioner, upon not less than seven days' notice, to appear before the council may determine to show cause why application should not be made for suspension from practice or for striking from the roll of the practitioner; provided that if the practitioner does not furnish written representations to the council as requested, or fails to appear before the council, as the case may be, the council shall be entitled to consider the report and recommendations of the committee, in the absence of such representations, or in the absence of the practitioner.'

[25] The high court dismissed the procedural challenge, holding that the Law Society was not bound by the decision of the committee as the committee was not a disciplinary committee, but rather an investigative committee. The high court's reasoning was that it was not peremptory for the Council to have pursued a formal charge before a disciplinary committee, if in its opinion, the respondent was no longer considered to be a fit and proper person to remain in practice as an attorney. I agree with this conclusion. In general it is correct that the Council may proceed with the application for the striking off of the practitioner or for his or her suspension from practice without pursuing a formal charge before a disciplinary committee if in its opinion, having regard to the nature of the charges, a practitioner is no longer considered to be a fit and proper person.

[26] In relation to the allegations relating to Dr Kgarume's complaint, the respondent admitted to have taken and used for his own account an amount of R48 000 out of the estate bank account, without the knowledge and authority of the executor and to have taken his fee prematurely. The respondent contended that he had concluded a contingency fee agreement with the executor, because in addition to attending to the administration of the estate he also did extensive work relating to a pension fund claim. The respondent, however, expressed his apology for 'borrowing' client's money which he said was a mistake which he regretted and had learned from it.

[27] His evidence is that at that time his practice was experiencing cash flow problems and he was unable to meet its operational expenses. He used R48 000 to pay some of the firm's expenses.

[28] In relation to the allegations of unprofessional conduct relating to Mr Manganya's matter, the respondent stated that he provided professional services to Mr Manganya for which he had charged fees in terms of a contingency fee agreement. He further stated that an amount of R150 000 was given to him by Mr Manganya as a gesture of thanks and that he had received taxed costs in an amount of R103 781.59 from the Road Accident Fund on behalf of Mr Manganya.

[29] As regards the allegations of unprofessional conduct arising from the

complaint of the Gauteng Department of Human Settlements the respondent contended that he had rendered certain legal services on behalf of the department; that the department's Deputy-Director of the Anti-Fraud Unit requested a meeting with him to conduct a review of the work done by him and the payments that he received from the department and that he refused to meet with him. The respondent justified his refusal on the basis of the contention that the department had failed to identify the nature of the information it was seeking from him. This was so, the respondent contended, because a laptop on which he stored documentation relating to the department's matters had crashed.

[30] The high court found in relation to the respondent's conduct in respect of the department's complaint that the evidence presented by the Law Society did not establish the offending conduct. The high court reasoned that it could not accept evidence which was not adduced under oath, 'least of all without the benefit of any oral evidence having been led under oath before a disciplinary committee; without the findings of a disciplinary committee, without a report under Rule 101, without the respondent having been given an opportunity to respond to such report, without the Council having considered any such report. . . .'

[31] In relation to the allegations of unprofessional conduct arising from the complaint of Dr Kgarume and Mr Manganya's matter, the high court found that an unprofessional and dishonourable conduct had been established, but such misconduct, was not sufficiently serious as to warrant a suspension from practice or a striking from the roll having regard to the mitigating factors.

[32] According to the high court the following is what weighed heavily in favour of the respondent: In relation to Dr Kgarume's complaint, before the complaint was lodged with the Law Society, the respondent had approached his client and admitted to what he had done and undertook to repay the money which he did. The incident took place six years before the application was brought, and there had been no further evidence of any misappropriation of trust funds. The respondent was a young practitioner at the time that he entered into the contingency fee agreement and did not have the benefit of years of experience to have known that it was incompetent to enter into a contingency fee agreement in relation to the administration of a

deceased estate and that the respondent did not charge the full 15 per cent provided for in the agreement. The high court accordingly dismissed the application and relying on *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) it ordered each party to pay its own costs.

[33] The analysis of the high court's reasoning makes it clear that its finding that the Law Society had failed to institute a formal disciplinary enquiry to establish unprofessional conduct on the part of the respondent, was central to its dismissal of the application. In para 25 of the judgment the high court states:

'All aspects considered, and upon application of the applicable tests, enunciated above, upon the facts, cumulatively assessed and correctly contextualised as presented, there is insufficient offending conduct established to motivate a striking from the roll or suspension from practice. This may not have been so, had the allegations made by the Department of Human Settlements been proven facts. Given the mitigating factors in relation to the other conduct, even though such conduct is dishonourable, when imposing a value judgement upon such conduct, we do not consider same to be such so as to render the Respondent unfit to remain in practice as an attorney.'

[34] The finding by the high court, at least in relation to Dr Kgarume's complaint and Mr Manganya's matter that unprofessional conduct on the part of the respondent had been established, was on the face of it, sufficient for the high court to proceed to the second and third legs of the enquiry. It was duty bound to consider whether the respondent, in its discretion, was not a fit and proper person to continue to practise, and to enquire whether in all the circumstances the respondent was to be removed from the roll of attorneys or whether he should be suspended from practice.

[35] In *Malan*[5] the following was said in connection with the third leg of the enquiry at para 6:

'As pointed out in *Jasat*, the third leg is also a matter for the discretion of the court of first instance, and whether a court will adopt the one course or the other depends 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 need to protect

[5] Ibid fn 2.

the public. Ultimately it is question of degree.'

[36] The high court in respect of the respondent's admitted misconduct misconstrued the nature of its role when it is approached under s 22(1)(d) of the Act to exercise its disciplinary powers over a practitioner. It did not consider the interest of the public. Importantly, the high court did not pause to consider that *this case* given the serious nature of the complaints other than the admitted conduct called for a full enquiry. This was a case in which the charges levelled against the respondent, which he did not admit, were sufficiently serious to warrant a full enquiry so that all the facts could be placed before a court for a final decision on whether the respondent should be permitted to practise as an attorney. After all, the Law Society itself initially held the view, in respect of the department's allegation of fraudulent conduct, that it had to be referred for investigation. As stated above, the Law Society is not obliged to have a full disciplinary enquiry as envisaged in the rules as referred to above before it approaches the court for a relief.

[37] In the present case having regard to the serious allegations of misconduct not only in relation to the department's complaint, but also involving the concerns in relation to Mr Manganya, the high court below and the Law Society should equally have been alert to having those allegations fully investigated. Even on the limited facts presented they could not readily be dismissed out of hand.

[38] In light of what has been said in the preceding paragraphs the high court as *custos mores* ought, on the admitted misconduct in order to protect the public, to have postponed a final decision, but also at the same time protect the public with an interim order of suspension pending a final decision on whether the respondent should be struck off the roll or some other sanction should follow. This it did not do.

[39] It was conceded on behalf of the Law Society that the order contemplated in the preceding paragraphs should ensue and that it would be fair that the respondent be given an opportunity to present his side of the story at a full blown enquiry which he had always called for. Counsel on behalf of the respondent was constrained to accept that this was a proper course to follow, notwithstanding Mr Reddy's statements referred to in para 13. Counsel were agreed that the Law Society should

be directed to initiate and complete the envisaged enquiry within a period of three months from the date of delivery of this judgment, which will be reflected in the substituted order of the court below that follows. Counsel on behalf of the respondent undertook on his behalf to co-operate with the Law Society and not to be dilatory.

[40] A question arose as to the effect of the Legal Practice Act 28 of 2014 on the disciplinary enquiries that had hitherto been conducted by the Law Society. This is not the question for this court to resolve. It is not for us to advise on the provisions of the Act and on transitional provisions, particularly without the full views of the legal profession in regard thereto. Suffice to say that the direction envisaged above will apply to the Law Society and / or its successor in title. It is necessary to record that the postponed application when it is re-enrolled should be heard by the high court differently constituted.

[41] A further factor dictating the desirability of a full blown enquiry into the facts is the effect it may have in the future in the event of a finding that the respondent be struck off the roll. The full breath of a practitioner's prior conduct should be before a court considering an application for re-admission.

[42] In my view, having regard to what is said above, no order as to costs in the present appeal should be made.

[43] In the circumstances the order in the following terms is issued:

1 The appeal is upheld to the extent reflected in the order set out below;

2 The order of the high court is set aside and is replaced with the following:

'(a) The respondent is, as an interim measure suspended from practising as an attorney pending a disciplinary enquiry concerning his professional conduct;

(b) The relief sought in prayers 2 up to 8.3, 9, 10.1, 10.2, 10.3, 10.4, 10.5, 11 and 12 of the notice of motion dated 12 January 2016 is hereby incorporated in this order;

(c) The enquiry referred to in (a) above must be instituted and finalised within 3 (three) months from the date of this judgment;

(d) The application for the removal of the respondent's name from the roll of attorneys pending the finalisation of the enquiry referred to in (a) above, is

postponed;

(e) The parties may supplement their papers, if so advised, on the matters emanating from the enquiry.

(f) Costs are reserved.’

3 No order is made as to costs.

_____
D H Zondi
Judge of Appeal

APPEARANCES

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