THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case No: 593/07
No precedential significance

ASIWANGA ADOLPH MADZIVHANDILA Appellant

and

THE LAW SOCIETY OF THE NORTHERN PROVINCES Respondent

Neutral citation: *Madzivhandila v Law Society of the Northern Provinces* (593/07) [2008] ZASCA 101 (17 September 2008)

Coram : MPATI P, STREICHER, MTHIYANE, CACHALIA JJA and BORUCHOWITZ AJA

Heard : 2 SEPTEMBER 2008

Delivered : 17 SEPTEMBER 2008

Summary : Attorney – Misconduct – Application for removal from roll – failure to file answering affidavit – unpreparedness of attorney on trial date not fully explained – no basis to interfere with trial court's exercise of its discretion to refuse postponement.

ORDER

On appeal from: High Court, Venda (Hetisani J and Makgoba AJ sitting as court of first instance)

1 The appeal is dismissed.

2 The appellant is ordered to pay the respondent's costs of appeal on the scale as between attorney and client.

JUDGMENT

MPATI P (STREICHER, MTHIYANE, CACHALIA JJA and BORUCHOWITZ AJA concurring):

[1] The appellant appeals against an order of the Venda High Court (Makgoba AJ, with Hetisani J concurring) removing his name from the roll of attorneys of that court, with ancillary relief. The appeal is with the leave of this court, the court below having refused leave.

[2] The appellant was a member of the Venda Law Society. He was admitted and enrolled as an attorney on 27 November 1997 and practised for his own account under the name and style Madzivhandila Attorneys, at Thohoyandou. He registered his practice with the respondent on 8 January 2001.

[3] During 2005 the respondent received two complaints against the appellant lodged by Attorneys Booyens du Preez and Boshoff, of Thohoyandou, on behalf of two complainants. The complaints contained allegations that the appellant had failed to account to the two complainants in respect of funds held in trust on their behalf, following settlement of their damages claims against the Road Accident Fund.

[4] Pursuant to the receipt of the complaints the respondent engaged a chartered accountant, Mr Deleeuw Swart, to conduct an inspection of the appellant's accounting records, particularly in respect of the two complaints. Subsequent to the execution of his mandate Mr Swart submitted a written report to the respondent on 29 July 2005. The report is annexed to the respondent's founding affidavit deposed to by its then president, Mr Ronald Bobroff. Mr Swart also deposed to an affidavit confirming the correctness of his findings as recorded in his report.

[5] The complaints against the appellant are contained in sworn statements which are annexed to Mr Swart's report. In the first, Ms Mudau instructed the appellant during 2001/2002 to lodge a claim on her behalf against the Road Accident Fund for loss of support suffered by her minor child as a result of the death of the child's father. The claim was settled in or about January 2004. The appellant telephoned her during April 2004 and advised her of the settlement, but informed her that he would 'pay it out on finalisation of his bill which he was preparing'. During June 2004 and following numerous unsuccessful telephonic enquiries Ms Mudau called at the appellant's offices where she was requested to furnish her banking details. She complied. After yet further delay she returned to the appellant's offices during July/August 2004. The appellant informed her that he had invested the funds, and 'was waiting for the moneys to be paid back with interest'. He showed her a print-out which he had obtained from Standard Bank, reflecting an amount of approximately R47 000, but which was under an unknown name. He informed her further that the money would be paid out during November 2004. When she called at his offices on 1 November 2004 he handed her a cheque in the sum of R74 737 and requested her to bank it on 29 November 2004. However, the cheque was not negotiated by Ms Mudau's bank. She was told that the cheque had either been dishonoured or payment had been stopped as there were insufficient funds in the drawer's account. All subsequent attempts to obtain payment of the moneys due to her came to nought.

[6] Ms Nematatani also instructed the appellant to claim damages from the Road Accident Fund on behalf of her minor child arising from the death of the child's father. The claim was settled and an amount of R52 408.85 was paid into the appellant's trust account on 16 January 2004. The appellant only informed her of the settlement during August 2004. He had advised her pursuant to numerous enquiries between January 2004 and August 2004 that he was still waiting for payment from the Road Accident Fund. Payment was confirmed by him when she and her father confronted the appellant at his offices during August 2004. On that occasion he handed her a cheque for approximately R34 000 and requested that she bank it after 21 days. He

subsequently telephoned her and asked her to return the cheque and undertook to deposit the money into her bank account. After three weeks she, again accompanied by her father, called at appellant's offices. He told them that they should first make an appointment to see him. On 11 November 2004 he handed her a cheque in his offices. When she attempted to bank the cheque she was informed that there were insufficient funds in the account to honour payment of the cheque. On being confronted by the complainant, her father and sister the appellant admitted that he had spent her money and that he did not have enough funds to pay her. He undertook to pay her on or before 3 December 2004. He gave her a letter of undertaking to pay the money. However, no moneys were deposited into her account by 3 December 2004. When she telephoned him he said he was in Pretoria and that he could not help her. By 15 April 2005, the date on which the complainant made her sworn statement, the appellant had not accounted to her at all.

[7] Mr Swart records in his report that due to the unavailability of the appellant's accounting records, a proper investigation of these complaints could not be undertaken. His report states, however, that the appellant indicated to him that the two complainants were the first and second widows of the deceased and that his firm had been faced with the difficulty of determining 'how the settlement should be divided' between them. He informed Mr Swart further that he had held amounts of R74 737 and R52 406 on behalf of the complainants respectively and that after fees and contingencies had been deducted Ms Nematatani received R34 807. He allowed for deductions of R24 300 on Ms Mudau's claim. He thus advised that his firm had rendered payment and that he regarded the matter as finalised.

[8] In a supplementary affidavit deposed to by its subsequent president, Mr Mohamed Junaid Husain, on 11 December 2006, the respondent alleges that further complaints against the appellant were received. These also concerned an alleged failure on the part of the appellant to account to his clients. Mr Swart was again instructed to conduct an investigation of the affairs of the appellant's practice. On 3 November 2006 he submitted a written report on his findings. He was again unable to

conduct a proper investigation as the appellant's accounting records were not available. They were allegedly in the possession of his bookkeeper in Pretoria. A summary of the complaints follows.

[9] Mr Tshikau instructed the appellant to handle a third party claim on his behalf. He learned from the Road Accident Fund that an amount of R432 235.50 had been paid by the Fund to appellant's firm on 18 May 2006. When he made enquiries the appellant informed him that he had invested the money as he was compelled by law to invest moneys in excess of R100 000. On 16 July 2006 Mr Tshikau called at the appellant's offices where the appellant undertook to deposit the total amount due into Mr Tshikau's bank account on 24 July 2006. On 18 July 2006 the appellant furnished Mr Tshikau with a cheque for R324 178.88. It was post-dated to 16 August 2006. Mr Tshikau returned the cheque because, according to him, it did not provide for interest earned. Another cheque for R262 000 was subsequently deposited into his account on 17 August 2006, but the cheque was returned unpaid. The appellant explained to Mr Swart that Mr Tshikau's funds were not available in the firm's trust account; that the firm had experienced financial difficulties and that he therefore utilised Mr Tshikau's funds to pay for arrear rentals, salaries and other expenses.

[10] The second complaint was that of Mr Magoda. The appellant acted for him in a criminal matter. Mr Magoda was convicted on 4 March 2004. He subsequently paid R5 000 to the appellant in respect of fees and disbursements relating to an appeal to be lodged by the appellant on his behalf against his conviction and sentence. Nothing further transpired and enquires by Mr Magoda have yielded no response. The appellant's explanation to Mr Swart was that he was aware of the matter and that the appeal had been lodged. However, he was unable to report on the progress or outcome of the appeal and could not locate his office file relating to it.

[11] The appellant filed a Notice of Intention to Oppose the application on 11 April 2006, but failed to deliver an answering affidavit. On 13 October 2006 the Registrar of the Venda High Court set the matter down for hearing on 19 March 2007. On 15 March

2007 the appellant gave notice, in terms of Rule 6(5)(d)(iii),[1] of his intention to raise certain points *in limine*. He also gave notice, separately, of an application for an order (a) condoning his late filing of the notice in terms of Rule 6(5)(d)(iii); (b) granting him an extension of time to deliver and file his answering affidavit within fifteen days from the date of such order, and (c) directing that he pays the costs occasioned by the application.

[12] On the day of the hearing the court a quo dismissed the appellant's application for a postponement. After hearing argument on the merits the court made an order that the name of the appellant be struck off the roll of attorneys, and granted other ancillary relief, together with costs on the scale as between attorney and client. The court accepted the respondent's allegations as set out in the founding papers and found that the appellant had contravened the provisions of s 78(1) of the Attorneys Act,[2] as well as certain of the respondent's rules of professional conduct.

[13] In this court counsel for the appellant raised three issues for consideration. They are: (i) the respondent had no locus standi to institute the proceedings against the appellant; (ii) the constitutionality of s 84A of the Attorneys Act, and (iii) the court a quo's refusal to grant an extension of time so as to enable the appellant to deliver answering papers.

[14] On the question of locus standi counsel submitted that the appellant was not a member of the respondent and that the latter therefore had no authority or jurisdiction over him and thus had no standing to institute proceedings for an order striking the appellant's name off the roll of attorneys; that the Venda Law Society,[3] of which the appellant was a member, should have been joined not as second respondent but as a

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1 Rule 6(5)(d)(iii) provides: 'Any person opposing the grant of an order sought in the notice of motion shall – if he intends to raise any question of law only he shall deliver notice of his intention to do so, within the time stated in the preceding sub-paragraph, setting forth such question.' The period referred to in the sub-rule is fifteen days of notifying the applicant of the intention to oppose.

2 Act 53 of 1979. Section 78(1) reads: 'Any practising practitioner shall open and keep a separate trust banking account at a banking institution in the Republic and shall deposit therein the money held or received by him on account of any person.'

3 The Venda Law Society was cited as second respondent, but no relief was sought against it.

'co-applicant'. In the alternative, it was submitted that the respondent should rather have sought an order compelling the Venda Law Society to discipline the appellant.

[15] In its judgment the court a quo remarked that when counsel for the appellant was referred to the decisions in *Law Society, Northern Provinces (Incorporated as the Law Society of the Transvaal) v Maseka*[4] and *Law Society of the Northern Provinces v Mamatho* [5], he 'wisely . . . conceded that his point *in limine* regarding jurisdiction had no merit'. Despite the observation of the court a quo, however, counsel argued the point in this court.

[16] In *Mamatho*[6] this very point failed in the court a quo. On appeal to it this court said the following:

'[I]n terms of s 6 of the Attorneys and Matters Relating to Rules of Court Amendment Act 115 of 1998, the respondent, being an attorney practising within the former Republic of Venda, became obliged within 21 days of the commencement of that Act (15 January 1999) and subject to the rules of the Law Society of the Transvaal (the appellant) to apply for the issue of a fidelity fund certificate in terms of s 42(3) of the Attorneys Act. Section 84A of the Act (inserted by s 5 of Act 115 of 1998) specifically affords to the appellant the power, in respect of an attorney practising in Venda, to perform any function which is similar to a function assigned to it by, *inter alia*, s 22(1)(d) of the Act. The effect of these provisions is therefore to place attorneys practising in the area of the former Republic of Venda under the jurisdiction of the appellant insofar as matters relating to the fidelity fund are concerned.'[7]

Section 22(1)(d) of the Attorneys Act reads:

'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 -

. . .

4 2005 (6) SA 372 (B).
5 2003 (6) SA 467 (SCA).
6 Ibid.
7 At 471 para 5.

(d) if he, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney.'

Clearly, then the respondent, by virtue of the provisions of s 84A of the Attorneys Act had authority in the present matter to institute proceedings against the appellant for an order in terms of s 22(1)(d).

[17] But, says counsel for the appellant, s 84A is unconstitutional in that its confers upon the respondent the power to supervise practitioners in the former TBVC[8] States, whereas those practitioners are not members of the respondent. It appears from its judgment that the court a quo did not consider counsel's submissions in this regard. This, to my mind, is not surprising. There is nothing in the appellant's papers to substantiate the allegation of the unconstitutionality of s 84A. There is no mention of any provision of the Constitution to which s 84A is said to be contrary. In *Prince v President, Cape Law Society and others*[9] Ngcobo J said:

'Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the Court information relevant to the determination of the constitutionality of the impugned provisions. . . . The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as to allow it the opportunity to present factual material and legal argument to meet that case.'[10]

When asked on which provision of the Constitution the appellant relied for the alleged unconstitutionality of s 84A counsel was unable to point to any. Nothing further needs be said on this issue.

[18] The next issue to be considered is the complaint against the refusal of the court a quo to grant the appellant an extension of time within which to deliver his answering affidavit. Although it opposed the application, the respondent did not file opposing

8 Acronym for the former Republics of Transkei, Bophuthatswana, Venda and Ciskei.
9 2001 (2) SA 388 (CC), (2001 (2) BCLR 133).
10 At 399 para 22.

papers, understandably so, because the papers in respect of the application for a postponement were only delivered four days before the date of hearing of the main application.

[19] The appellant makes the following allegations in his affidavit in support of the application for an extension of time:

'4 The reason why I am late for filing of the aforesaid documents is that I was unable to consult with counsel and my Attorneys of Record. I was failing to come to terms with my fate and couldn't concentrate. In three previous consultations that we tried to have with my Attorneys of Record I broke down several times and couldn't narrate my version of events thoroughly.

5 It is only yesterday that I was able to consult fully with counsel, Adv. Sikhwari. Unfortunately, it could not have been possible for Counsel to cause my Answering Affidavit on the merits to be drafted, typed, served to Appellant's Attorneys and filed of Record.

6 I wish to state that Counsel is already at an advanced stage with preparations for my Answering Affidavit. However, it is my submissions that in the meantime, the matter may be heard on point *in limine* only, if this Honourable Court is pleased.

7 Another factor which has aggravated the delay is my health. For the past years my health has been deteriorating, more particularly after having been served with the papers for this Application.

8 My aforesaid delay in filing the necessary documents as aforesaid was not caused by deliberate disregard of the law and rules of this Honourable Court. I am advised, which advice I accept, that I do have reasonable prospects of success in the main Application against the Applicant, both on [the] merits and/or on [the] points *in limine*. My defence will be based on the points *in limine* raised in accordance with the Notice In Terms Of Rule 6(5)(d)(iii) which I will file simultaneously with this Application for Condonation. I pray that same be treated as part of this Supporting Affidavit.

9 My further defence on [the]merits will be to the effect that I have accounted to my clients

and there is no basis for the Applicant to bring this Application against me. This point will be fully canvassed in my Answering Affidavit.'

Counsel contended that these averments should have been accepted as they were uncontested and the court a quo should accordingly have granted the postponement sought.

[20] The grant or refusal of an application for a postponement at the instance of a party involves the exercise of a discretion by the court hearing the application. A respondent is not entitled to a postponement as of right. As was said in *Manufacturers Development Co (Pty) Ltd v Diesel & Auto Engineering Co and others*[11] this 'is something which is in the discretion of the Court and an important circumstance in the exercise of that discretion is whether the respondent is able to show *prima facie* that if it is granted the indulgence of a postponement it will be able to place facts before the Court which will constitute a ground of opposition to the relief claimed'.[12]

[21] In *Motaung v Mukubela and another NNO*; *Motaung v Mothiba NO*[13] two applications for review in terms of Rule 53 were served on the respondents. More than four months after service of the applications and one day after a date of hearing had been allocated the respondents filed documents purporting to be a notice of intention to oppose in each of the applications. At the hearing of the applications counsel for the respondents applied for a postponement of both applications to enable them to make substantive applications for condonation for failing to comply with the requirements of Rule 53 and for leave to oppose both matters. In giving its reasons for refusing to grant any postponement the court said that the respondents –

'. . . had to satisfy the Court that:

(a) there was a reasonable explanation for the delay which necessitated the application for the postponement and that

(b) they had a *prima facie* and a *bona fide* defence to both applications.

11 1975 (2) SA 776 (W).
12 Ibid at 777E-F.
13 1975 (1) SA 618 (O).

The respondents had, in other words, to satisfy the Court that they had a defence which was not patently unfounded. Cf *Smith NO v Brummer NO and Another; Smith NO v Brummer* 1954 (3) SA 352 (O) at p 358A, and *Dalhouzie v Bruwer* 1970 (4) SA 566 (C) at p 572.'[14]

And further:

'Where a respondent seeking such a postponement has in fact no defence in law to the applicant's claim, it would be purposeless to grant the postponement asked for. In such a case the postponement would result in a needless waste of time and money.'[15]

[22] And this court, in *Madnitsky v Rosenberg*[16] warned that a court 'should be slow to refuse to grant a postponement where the reason for a party's unpreparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics, and where justice demands that he should have further time for the purpose of presenting his case'.[17] Did the appellant in the present matter satisfy these requirements?

[23] The only explanation given by the appellant for the delay in delivering and filing an answering affidavit is that he was unable to consult with counsel and his attorneys of record, this because he could not come to terms with his fate and thus could not concentrate. He apparently attempted to consult with his legal representatives on three previous occasions, but broke down several times and could not narrate his version of events thoroughly. His health also deteriorated, particularly after he had been served with the application papers, and this aggravated the delay, says the appellant.

[24] In my view, the appellant's explanation totally lacks particularity. The papers were served on the appellant personally on 27 March 2006. A trial date was applied for on 30 June 2006. In the meantime and on 11 April 2006 he filed a Notice of Intention

14 Ibid at 624E-G.
15 Ibid at 624H-625A.
16 1949 (2) SA 392 (A).
17 At 399.

to Oppose the application. Six months thereafter, on 13 October 2006, a trial date was allocated another five months hence, on 19 March 2007. The appellant delivered his Rule 6(5)(d)(iii) notice and application for an extension of time to deliver and file an answering affidavit only five days before the trial date. He does not disclose when he had attempted to consult with his legal representatives. He does not disclose when his health began to deteriorate, nor does he disclose the nature of his ill-health. And in the midst of his inability to consult with his legal representatives because he allegedly could not come to terms with his fate, and his ill-health, he misappropriates a further R432 235.50 in trust funds held on behalf of a client, Mr Tshikau. So despite his alleged difficulty to come to terms with his fate and his ill-health, he carried on with his practice and misappropriated more trust funds with full knowledge of the application to have his name struck from the roll of attorneys.

[25] In my view, the explanation for the delay falls hopelessly short of being reasonable.[18] I am in any event of the view that the reason for the appellant's unpreparedness as at the date of trial has not been fully explained.[19]

[26] In an attempt to satisfy the second requisite for a postponement, that is that he has a prima facie and a bona fide defence to the application, the appellant states in his supporting affidavit that his defence will be based 'on the points *in limine* raised in accordance with the Notice in terms of Rule 6(5)(d)(iii)'. I have already dealt with the points in limine. None has any substance.

[27] A further defence which is raised by the appellant is that he has accounted to his clients and that there is therefore 'no basis for the [respondent] to bring this application' against him. Realising the baldness of this assertion the appellant states that the point 'will be fully canvassed' in his answering affidavit. At the time that the appellant deposed to the affidavit in support of his application for a postponement, he had already, on the previous day, consulted fully with counsel. He was therefore in a

18 *Motaung's* case, above footnote 17.
19 *Madnisky v Rosenberg*, above footnote 18 at p 399.

position to add facts to his supporting affidavit, such as when and how he had accounted to his clients. The court below could not, on the bald allegation of his having accounted, properly consider whether or not the appellant has a prima facie and bona fide defence to the application. Neither can this court. It would thus be purposeless to grant the postponement as to do so would result in a needless waste of time and money.[20]

[28] It follows that this court cannot hold that the court a quo did not exercise its discretion judicially in refusing the postponement. The following order is made:

1 The appeal is dismissed.

2 The appellant is ordered to pay the respondent's costs of appeal on the scale as between attorney and client.

MPATI P

20 *Motaung*, above footnote 17 at 624H-625A.

Appearances:

For appellant: M S Sikhwari

Instructed by
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Matsepes Inc Bloemfontein

For respondent A T Lamey (attorney)

Instructed by
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