THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case No: 568/2007

ANDRé MALAN 1st Appellant

FRANCOIS MALAN 2nd Appellant

and

THE LAW SOCIETY OF THE NORTHERN PROVINCES Respondent

Neutral citation: *Malan v The Law Society of the Northern Provinces* (568/2007) [2008] ZASCA 90 (12 SEPTEMBER 2008)

Coram: HARMS ADP, STREICHER, CLOETE JJA, LEACH and KGOMO AJJA
Heard: 28 AUGUST 2008
Delivered: 12 SEPTEMBER 2008
Updated:
Summary: Attorney – striking from the roll – restatement of approach

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ORDER

On appeal from: High Court, Pretoria (Botha J and Murphy J sitting as court of first instance).

1. The appeal is dismissed with costs.
2. The costs are to be paid jointly and severally by the appellants and are to be taxed on the scale of attorney and client.

JUDGMENT

HARMS ADP (STREICHER, CLOETE JJA, LEACH and KGOMO AJJA concurring):

[1] This is an appeal by two attorneys, the brothers André and Francois Malan, who had practised in partnership in Alberton under the name Malan & Partners. Both were removed from the roll of attorneys and conveyancers (and the first appellant, André, from that of notaries) by the High Court, Pretoria. They appeal with leave of the high court on the ground that the high court had erred in the exercise of its discretion by deciding to remove them from the roll. Instead, they say, they should have been suspended from practice for a given time, bearing in mind that they had been provisionally suspended since 10 September 2002.

[2] The leisurely pace of the proceedings needs some explanation. The appellants did not file affidavits to oppose the application for their provisional suspension because, they said, they were so shocked and traumatised by the allegations that they were unable to reply. (Since most of the allegations turned out to be true and of their own making their shock is somewhat difficult to understand.) During March 2003, the present respondent, the Law Society of the Northern Provinces (the Society), filed a short supplementary affidavit. It took the appellants more than three years to file their answering affidavits. The high court delivered its judgment on 14 May 2007 and granted leave to appeal on 10 September 2007.

[3] Although the principles applicable to striking off applications have often been stated, it is necessary to restate them once more to emphasise aspects that tend to be ignored or misunderstood. The Society launched its application under 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 society concerned be struck off the roll or suspended from practice by the court. . . if he, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney”.

[4] As was said in *Jasat v Natal Law Society* 2000 (3) SA 44, [2000] 2 All SA 310 (SCA) at para 10, s 22(1)(d) contemplates a three-stage inquiry:

First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual inquiry.

Second, it must consider whether the person concerned ‘in the discretion of the Court’ is not a fit and proper person to continue to practise. This involves a weighing up of the conduct complained of against the conduct expected of an attorney and, to this extent, is a value judgment.

And third, the court must inquire whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice.

[5] As far as the second leg of the inquiry is concerned, it is well to remember that the Act contemplates that where an attorney is guilty of unprofessional or dishonourable or unworthy conduct different consequences may follow. The nature of the conduct may be such that it establishes that the person is not a fit and proper person to continue to practise. In other instances the conduct may not be that serious and a law society may exercise its disciplinary powers, particularly by imposing a fine or reprimanding the attorney (s 72(2)(a)). This does not, however, mean that a court is powerless if it finds the attorney guilty of unprofessional conduct where such conduct does not make him unfit to continue to practise as an attorney. In such an event the court may discipline the attorney by suspending him from practice with or without conditions or by reprimanding him: *Law Society of the Cape of Good Hope v C* 1986 (1) SA 616 (A) at 638I-639E; *Law Society of the Cape of Good Hope v Berrangé* 2005 (5) SA 160 (C) at 173G-I, [2006] 1 All SA 290 (C) at 302.

[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 the public. Ultimately it is a question of degree. It is here where there appears to be some misunderstanding.

[7] First, in deciding on whichever course to follow the court is not first and foremost imposing a penalty. The main consideration is the protection of the public.

[8] Second, logic dictates that if a court finds that someone is not a fit and proper person to continue to practise as an attorney, that person must be removed from the roll. However, the Act contemplates a suspension. This means that removal does not follow as a matter of course. If the court has grounds to assume that after the period of suspension the person will be fit to practise as an attorney in the ordinary course of events it would not remove him from the roll but order an appropriate suspension. In this regard the following must be borne in mind:

'The implications of an unconditional order removing an attorney from the roll for misconduct are serious and far-reaching. *Prima facie*, the Court which makes such an order visualises that the offender will never again be permitted to practise his profession because ordinarily such an order is not made unless the Court is of the opinion that the misconduct in question is of so serious a nature that it manifests character defects and lack of integrity rendering the person unfit to be on the roll. If such a person should in the years apply for re-admission, he will be required to satisfy the Court that he is "a completely reformed character" (*Ex parte Wilcocks* 1920 TPD 243 at 245) and that his "reformation or rehabilitation is, in all the known circumstances, of a permanent nature" (*Ex parte Knox* 1962 (1) SA 778 (N) at 784). The very stringency of the test for re-admission is an index to the degree of gravity of the misconduct which gave rise to disbarment.'

(*Incorporated Law Society, Natal v Roux* 1972 (3) SA 146 (N) at 150B-E quoted with approval in *Cirota v Law Society Transvaal* 1979 (1) SA 172 (A) at 194B-D.) It is seldom, if ever, that a mere suspension from practice for a given period in itself will transform a person who is unfit to practise into one who is fit to practise. Accordingly, as was noted in *A v Law Society of the Cape of Good Hope* 1989 (1) SA 849 (A) at 852E-G, it is implicit in the Act that any order of suspension must be conditional upon the cause of unfitness being removed. For example, if an attorney is found to be unfit of continuing to practise because of an inability to keep proper books, the conditions of suspension must be such as to deal with the inability. Otherwise the unfit person will return to practice after the period of suspension with the same inability or disability. In other words, the fact that a period of suspension of say 5 years would be a sufficient penalty for the misconduct does not mean that the order of suspension should be 5 years. It could be more to cater for rehabilitation or, if the court is not satisfied that the suspension will rehabilitate the attorney, the court ought to strike him from the roll. An attorney, who is the subject of a striking off application and who wishes a court to consider this lesser option, ought to place the court in the position of formulating appropriate conditions of suspension.

[9] Third, the exercise of this discretion is not bound by rules, and precedents consequently have a limited value. All they do is to indicate how other courts have exercised their discretion in the circumstances of a particular case. Facts are never identical, and the exercise of a discretion need not be the same in similar cases. If a court were bound to follow a precedent in the exercise of its discretion it would mean that the court has no real discretion. (See *Naylor v Jansen* 2007 (1) SA 16 (SCA) at para 21.)

[10] The appellants relied on *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA) for the proposition that unless a court finds dishonesty during the first leg of the inquiry, it ought not to remove the attorney concerned from the roll. In *Summerley* the following was said in connection with the exercise of this discretion (at para 21):

'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 [citations omitted]. This distinction is not difficult to understand. The attorney's profession is an honourable profession, which demands complete honesty and integrity from its members.'

Obviously, if a court finds dishonesty, the circumstances must be exceptional before a court will order a suspension instead of a removal. (Exceptional circumstances were found in *Summerley* and in *Law Society, Cape of Good Hope v Peter* [2006] ZASCA 37 and the court was able in the formulation of its order in those cases to cater for the problem by requiring that the particular attorney had to satisfy the court in a future application that he or she should be permitted to practise unconditionally.) Where dishonesty has not been established the position is as set out above, namely that a court has to exercise a discretion within the parameters of the facts of the case without any preordained limitations.

[11] As mentioned in *Summerley* (at para 15), the fact that a court finds that an attorney is unable to administer and conduct a trust account does not mean that striking-off should follow as a matter of course. The converse is, however, also correct: it does not follow that striking-off is not an appropriate order (compare *Prokureursorde van Transvaal v Landsaat* 1993 (4) SA 807 (T); *Law Society of the Transvaal v Tloubatla* [1999] 4 All SA 59 (T)). To the extent that the judgment in *Law Society of the Cape of Good Hope v King* 1995 (2) SA 887 (C) at 892G-894C propagates an 'enlightened approach', requiring courts to deal with misconduct which does not involve dishonesty with (in my words) kid gloves, I disagree. In order to stem an erosion of professional ethical values a 'conservative approach' is more appropriate (*Incorporated Law Society, Transvaal v Goldberg* 1964 (4) SA 301 (T) at 304A-F).

[12] A court of appeal has limited powers to interfere with a decision of the court of first instance. In relation to the first leg of the inquiry, which is factual, appeals are subject to the general limitation that courts of appeal defer to the factual findings of courts of first instance (*R v Dhlumayo* 1948 (2) SA 677 (A)). This rule has limited, if any, application if the court of first instance decided the case on paper, i e, in application proceedings, because in such a case the court of appeal is in as good a position to judge the facts as was the court below. There are factual disputes in this case and the high court decided the matter with reference to the so-called *Plascon-Evans* rule, namely to base its decision on facts that are common cause or otherwise on the appellants' (the then respondents') version. The high court did not consider the second and important leg of the *Plascon-Evans* rule namely whether the disputes raised were real, genuine or bona fide, or whether the allegations or denials were so far-fetched or clearly untenable that the court would have been justified in rejecting them merely on the papers. (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I-635D.) The application of the 'rule' in cases such as this requires a consideration of the fact that it is a *sui generis* procedure, and that an attorney is not entitled to approach the matter as if it were a criminal case and rely on denial upon denial and, instead of meeting the allegations, to deflect them and, as part of the culture of blame, always blame others (*Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 853E-G).

[13] The 'discretion' of the court of first instance in relation to the second and third leg is in the nature of a value judgment. In principle, a court of appeal is entitled to substitute its value judgment for that of the court of first instance if it disagrees. However, this Court has held consistently that the discretion involved is a strict discretion, which means that a court of appeal may only interfere if the discretion was not exercised judicially: *Kekana v Society of Advocates of SA*, 1998 4 SA 649, [1998] 3 All SA 577 (SCA); *Vassen v Law Society of the Cape of Good Hope* 1998 4 SA 532 (SCA) 537. This means that a court of appeal is not entitled to interfere with the exercise by the lower court of its discretion unless it failed to bring an unbiased

judgment to bear on the issue; did not act for substantial reasons; exercised its discretion capriciously, or exercised its discretion upon a wrong principle or as a result of a material misdirection. (See also *Mabaso v Law Society, Northern Provinces* 2005 2 SA 117 (CC) at para 20; *Giddey NO v JC Barnard & Partners* 2007 (5) SA 525 (CC) at para 20.)

[14] As stated at the outset, the appellants argue that the high court should not have imposed the 'ultimate' penalty of striking off but should rather have suspended them from practice. They accept that they are not fit and proper persons to continue to practise as attorneys. Because of this it is unnecessary to deal with the facts in any detail although the essence of the case against them has to be set out in order to evaluate the alleged misdirections underlying the exercise of the court's discretion on which the appeal is premised.

[15] The practice of Malan & Partners had only the two partners and it had no other professionals in its employ. André conducted a deeds practice while Francois dealt, exclusively it would appear, with claims against the Road Accident Fund that fell within the jurisdiction of the magistrates' courts. André in addition bore the bookkeeping responsibility, which he entrusted to a bookkeeper, Mrs Steyn.

[16] The problems that led to the application came to light as a result of the conduct of the RAF practice. Francois, as the sole professional, carried between 6000 to 7000 files at any given time. The files were the result of active touting. The firm engaged about 18 'consultants'. The consultants (some of whose names Francois could not recollect) 'found' RAF claimants, prepared the necessary documentation, produced a file and 'sold' the file to the firm. The firm would then file a claim against the RAF and, if the case was not settled, issue summons. Francois did not consult with the claimants and he provided little, if any, professional services to the clients. In this regard the business model differed from the ordinary case of touting where the tout produces a client and the attorney provides professional services to the client. One of the touts, Wilken, who had no qualifications to deal with such matters,

was later brought into the firm on a more or less permanent basis as administration manager, apparently on a commission basis, having been paid per file ‘sold’ to the firm. His duties were, according to Francois, to prepare all the documentation, to process claims and to submit them to the RAF.

[17] After Wilken had left his post, but while still selling claims to the firm, Francois became aware during September 2001 that Wilken had falsified claims. According to Francois’s affidavit this was brought to his attention by Wilken’s successor as administration manager but according to an earlier letter of his the problem was brought to his notice when the local branch office of the RAF informed him that one of the plaintiffs had denied any knowledge of the accident on which the claim was based. He had also been informed by the RAF on an unspecified date during 2001 that there were difficulties regarding the handwriting and signatures on affidavits and accident reports. He solved the problem by simply withdrawing all problem claims and giving an instruction (to whom, we are not told) that no further claims should be bought from Wilken and that no further Wilken claims should be submitted to the RAF. There were at the time apparently some 138 fraudulent claims in the pipeline. On 8 January 2002 (maybe during February), Wilken made an affidavit admitting some fraud while exonerating the firm. Nevertheless, Wilken was paid by the firm until end of January and he had a set of keys of the office during March when he entered the office and allegedly attempted to set it alight. He died shortly afterwards.

[18] Only on 8 March 2002 did Francois write to the RAF, mentioning the possibility of fraud by Wilken. (The RAF denied receiving the letter and it was resent on 28 March.) He did this as a result of problems he had experienced ‘recently’ with lodged claims. He thought that some 10 cases could have been involved. He said that he would lay a charge against Wilken and magnanimously undertook to indemnify the RAF against all false claims. On 11 April 2004, the RAF informed him that they had appointed a firm of assessors and investigators to investigate the firm’s claims. On unspecified dates (probably as a result of this information) the firm appointed first one and then another investigator to investigate the Wilken files. As a result of this

some 600 Wilken related claims were withdrawn; once again the dates are not available.

[19] The Society became aware (without the intercession of the appellants) of the fraud. It also received a complaint from a client concerning overreaching and the failure to account, and it decided to conduct an investigation into the affairs of the firm, which commenced on 25 June 2002. The appellants explained their *modus operandi* to the investigator during which they represented that the 'consultants' were paid for assessing quantum and for 'consultancy' work. This does not accord with the admitted *modus operandi* set out above.

[20] Francois's response to the charge of touting in his answering affidavit, which was made four years after the event, was that they had been 'advised' by their lawyers that their *modus operandi* could be viewed ('kan gesien word') as 'pro-aktiewe werwing' (touting) and this, he said, may have been due to naivety or because of the prevalence of the practice amongst other attorneys. As to the prevalence excuse, the high court correctly remarked that wrongdoing of others does not provide any justification and that reliance thereon is indicative of 'hoe morele waardes verval'. Furthermore, there is no evidence that touting, in the manner conducted by the firm, was practised by others. I shall revert to the naivety excuse in another context.

[21] The Society's investigation into the affairs of the firm opened the proverbial can of worms. The firm's bookkeeping was in a mess and nearly each rule in the book had been broken. I shall merely list them (the list may be incomplete): the firm failed to print quarterly lists of trust creditors since February 2001 and, accordingly, failed to balance the trust account, which made it impossible to determine whether there was a trust shortfall (contravening s 78(1) of the Act); the firm issued bearer trust cheques; trust cheques were cashed at the bank counter; fees were transferred to the business account in lump sums; it failed to comply with s 78(2A) when investing trust money on behalf of individual clients; closing debits are arbitrary; there were occasional trust debits; accounting to clients was done

improperly and payments were made late; trust and business funds were commixed; it failed to transfer interest on the trust account to the Society in contravention of s 78(3); it failed to account to clients within a reasonable time; it failed to comply with the provisions of s 78(4) and (6); it failed to exercise proper control over staff; it kept a 'slush fund' to pay touts and other consultants; and it failed to provide clients with professional services.

[22] All of this cannot be gainsaid although there are excuses and explanations, some unconvincing or unlikely. It is, accordingly, understandable why the appellants do not argue on appeal that they are fit and proper persons to continue practising as attorneys. I therefore turn to a consideration of the grounds on which the appellants seek to impugn the exercise of the high court's discretion to remove them from the roll.

[23] The first ground relied on is that the high court should have followed the approach adopted in *Law Society of the Cape of Good Hope v Berrangé* 2005 (5) SA 160 (C) where, in a case 'akin to touting', the attorney concerned was suspended from practice and not removed from the roll. I have already expressed my serious reservations about the precedential value of such cases but, in any event, the court in that case did not find that the attorney was unfit to continue to practise and, accordingly, the court could not have struck him from the roll. Instead, it exercised its inherent disciplinary jurisdiction to penalise the attorney by suspending him from practice. (At 173G-I.)

[24] The court below relied on *Cirota v Law Society Transvaal* 1979 (1) SA 172 (A), where striking off was ordered, holding that it was more comparable than *Berrangé* to the case at hand. Counsel for the appellants' submission that the high court followed this case 'slavishly' is without merit because the court said explicitly that this case is 'meer vergelykbaar' with *Cirota.* I have already stated that a factual analysis of earlier cases is not called for. However, counsel sought to convince us that in *Cirota* the court had found dishonesty and since no such finding was made by the high court, *Cirota* was a more serious case and not less serious as the high court held. Counsel's

argument has no merit. The ratio for the striking off is to be found in this dictum in *Cirota* (at 194E-F):

'But, having regard to what I have said concerning the seriousness of the appellants' contraventions in both the respects mentioned above, viz touting and not keeping proper books, I am of the view that they indeed displayed a lack of integrity thus rendering them unfit to be on the roll.'

[25] Although the high court did not find that the appellants were dishonest in conducting their practice, I question their honesty. Considering the provisions of s 19(c) of the Road Accident Fund Act 56 of 1996, namely that the RAF is not obliged to compensate if the claim concerned has not been instituted and prosecuted by an attorney, the procedure followed by the firm in this regard can only be considered as a dishonest circumvention of the provision. Also, touting on the scale and in the manner found here can also only be ascribed to dishonesty. Only a naïve person would believe that the *modus operandi* followed was due to naivety as Francois alleged. It is dishonest to charge a client for professional fees unless professional services are rendered. It is dishonest to charge a client for the cost of a tout under the heading 'disbursements'. Finally, at least part of the explanation for the failure to keep proper books is also untrue, as was the initial explanation of the *modus operandi* concerning the RAF claims.

[26] The high court found as aggravating the fact that in this case clients were prejudiced, something absent in *Cirota.* Counsel sought to attack this finding but, once again, the high court had it right. Allowing touts to perform professional services without oversight was reckless in the extreme and created potential prejudice. The record contains instances where claims had to be withdrawn because of the way the touts had prepared the claims. The high court also held that the appellants had shared fees with their touts. Counsel sought to assail this finding. The facts are these: the deponent of the Society's founding affidavit made such an allegation and the appellants did not deal with the allegation at all. But, says counsel, the founding affidavit contained no underlying facts to support the allegation and that the appellants

were, accordingly, not called upon to deal with the allegation. This reflects a cavalier approach towards a serious disciplinary matter, which is not an ordinary civil case but, as mentioned earlier, is *sui generis* (*Cirota* at 187H). In any event, the underlying documents provided sufficient grounds for making the allegation and the allegation had to be met, even on the ground that there were no facts to justify it.

[27] The appellants also argue that the high court had failed to take the extenuating circumstances into account. These in sum relate to the steps the firm had taken once the wrongdoings of Wilken became known. From this it is sought to argue that the high court had erred in holding that there was no indication on the papers that the appellants had any realization of the seriousness of their transgressions. It is true that the firm took the steps set out earlier after it had become aware of Wilken's fraud. What is also true is that it was rather slow in taking those steps. The time delays in the light of the seriousness of the problem are inexplicable. The lack of notification to the Society is incomprehensible. One cannot but gain the impression that the firm did little more than damage control. Of greater concern is that there was at that stage either no appreciation of the risk involved in the touting practice or a total recklessness by disregarding the risk. There is no evidence that the practice was discontinued. It was only some years later that the appellants accepted the advice that what they did 'could be viewed' as touting. If one turns to the bookkeeping charges, the position is simply that there is no allegation of a realization of the seriousness of the offences. They are brushed off on the basis that the Society had failed to prove a trust shortage, that the bookkeeper had erred, that they did not know the rules, that their auditors had erred, or simply by not dealing with the pertinent allegations. Furthermore, instead of dealing with the merits of the allegations, the appellants conducted a paper war and they attacked the Society and its officers, they attacked the Fidelity Fund and they attacked the attorneys who had to take over their files – in short, their approach on the papers was obstructionist.

[28] These factors are ‘aggravating’ and not extenuating because they manifest character defects, a lack of integrity, a lack of judgment and a lack of insight. The conduct of the practice was reckless in the extreme. It follows that the high court did not err in the exercise of its discretion. Counsel was unable to suggest any conditions of suspension that could cater for the situation. Implicit in the high court’s judgment is a finding (with which I agree) that the appellants should only be allowed to practise once they are able to convince a court that they know and understand professional ethics and the rules of bookkeeping, i e, that they are fit and proper persons to practise as attorneys. This will require an application for re-admission with the obstacles mentioned. To let the appellants loose on the unsuspecting public without that satisfaction would amount to a dereliction of duty.

[29] In the result the following order issues:

1. The appeal is dismissed with costs.
2. The costs are to be paid jointly and severally by the appellants and are to be taxed on the scale of attorney and client.

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L T C HARMS
ACTING DEPUTY PRESIDENT

APPEARANCES:
FOR APPELLANT: L W DE KONING
FOR RESPONDENT: A T LAMEY (Attorney)

ATTORNEYS:
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