**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

Case No: 189/2011

In the matter between:

**THE LAW SOCIETY OF THE NORTHERN PROVINCES** **Appellant**

**and**

**RACHEL FREDA SONNTAG** **Respondent**

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| **Neutral citation:** | ***Law Society v Sonntag*** **(189/2011) [2011] ZASCA 204 25 November 2011)** |
| **Coram:** | Harms AP, Lewis, Malan and Leach JJA and Plasket AJA |
| **Heard:** | **4 November 2011** |
| **Delivered:** | **25 November 2011** |

**Summary:** Attorney – removal from roll – attorney employing touts in third party work – sharing both office and fees with tout – 'purchasing' third party claims from touts – conduct of attorney in defending application dishonest – attorney struck off – no exceptional circumstances shown to justify lesser penalty.

## ORDER

**On appeal from:** North Gauteng High Court, Pretoria (M F Legodi J and Kruger AJ sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the court below is set aside and replaced with the following:
'An order is made in terms of prayers 1 to 12 of the notice of motion.'

## JUDGMENT

MALAN JA (Harms AP, Lewis, Malan and Leach JJA and Plasket AJA concurring):

[1] This is an appeal by the Law Society of the Northern Provinces against the judgment and order of the North Gauteng High Court (Legodi J, Kruger AJ concurring), suspending the respondent from practising as an attorney for one year but suspending that suspension for three years on certain conditions, with no order as to costs. The appellant appeals against both the order suspending the respondent from practising as well as against the failure to make an order as to costs, contending that the respondent should have been struck off the roll with costs. The appeal is with leave of the court below.

[2] Section 22(1)*(d)* of the Attorneys Act 53 of 1979 provides that a person who has been admitted and enrolled as an attorney may on the application of the law society be struck off the roll or suspended from practice 'if he, in the discretion of the court, is not a fit and proper person to continue to practise as an attorney'. The section envisages a three-stage inquiry:[1]

'First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual inquiry. Second, the court must consider whether the person concerned "in the discretion of the court" is not a fit and proper person to

1 *Botha v Law Society, Northern Provinces* 2009 (1) SA 227 (SCA) para 2; *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) para 10; *Malan & another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) para 4.

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. Third, the court must inquire whether in all the circumstances the attorney is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice.'

Provision is thus made for either the removal of an attorney who is not a fit and proper person from the roll or his or her suspension. As stated, '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.'[2]

[3] The respondent practised and still practises in Tzaneen under the name of Sonntag Attorneys. She was admitted as an attorney in 1999 and as a conveyancer in 2003. At the relevant times she was a sole practitioner but had a professional assistant, Mr Anton Burger, a candidate attorney and several staff members in her employ.

[4] As a result of complaints against the respondent the appellant instructed a legal official, Ms Magda Geringer, in the employ of the Law Society's Monitoring Unit to investigate the respondent's practice. A report was filed on 21 May 2007 and, following the recommendation by the appellant's disciplinary committee, the council of the appellant resolved to bring an application for the removal of the respondent from the roll of attorneys.

[5] The respondent faced several charges of unprofessional, dishonourable or unworthy conduct but only five are relevant. First, that the respondent in contravention of rule 89.26 referred work, the performance of which is reserved by law to an attorney, to a person, Basie van Schalkwyk, who was prohibited by law from performing such work, or assisted or co-operated with him in performing such work. Second, that the respondent in contravention of rule 89.27 acted for or in association with an organisation or person, not being a practising attorney, the said Van Schalkwyk, whose business consisted in making or prosecuting claims resulting from death or personal injury and who solicited instructions to that end and who

2 *Malan & another v Law Society, Northern Provinces* above para 8.

received payment or other consideration in respect thereof. Third, that the respondent in contravention of rule 89.28 knowingly acted for a person introduced or referred to her by the said Van Schalkwyk. Fourth, that the respondent in contravention of rule 89.2 shared an office with the said Van Schalkwyk who was not a practising member or in the employ of a practising member. Fifth, that the respondent in contravention of s 83(6) of the Attorneys Act shared or divided fees with Van Schalkwyk and Eugene Swanepoel who were not legal practitioners. At the hearing of the disciplinary committee held on 24 October 2007 pursuant to s 71 of the Attorneys Act the respondent pleaded not guilty to the charges.

[6] The respondent did not attend the subsequent proceedings of the disciplinary committee on 2 September 2008. She was, however, represented by counsel who advised the committee that she had reconsidered her plea of not guilty and decided to plead guilty to the five charges. Her representative accepted the correctness of the report of Ms Geringer. The respondent did not give evidence before the committee. The committee found her guilty on the five charges (and others which are of no relevance to this matter) and concluded that her conduct was so serious as to warrant a referral to the council of the appellant in terms of rule 101. A report was submitted to the council on which the respondent commented by way of affidavit. She also appeared before the council on 2 February 2009 when it was resolved to bring the application for her striking off.

[7] The court below had no hesitation in concluding that the respondent had correctly been found guilty on the five charges. The facts indeed bear this out. It also rejected her explanation that she had pleaded guilty in error and that she was emotionally upset at the time and that she did so because she had been promised a fine. I accept this finding. Implicit in it is the conclusion that the respondent was not a ‘fit and proper person’ to practise as an attorney. It was not contended otherwise on appeal and Mr Buys, who appeared on behalf of the respondent in this court, conceded that the facts relied on by the appellant in its application were not in dispute. What was submitted on behalf of the respondent was that the court below was correct in merely suspending the respondent and not removing her from the roll of attorneys.

[8] The charges stem from the involvement of the respondent with Van Schalkwyk from 2002 and later with the latter's son in law, Swanepoel, as well. Shortly after the respondent started her practice, Van Schalkwyk offered to assist her in the handling of third party claims. She made use of his services but their relationship soured towards the end of 2005. When she declined him access to her offices, he and Swanepoel proceeded to the Law Society and charged her with professional misconduct. Litigation between Van Schalkwyk and the respondent ensued. Van Schalkwyk had an office in her chambers. But his involvement went further: in an advertisement the respondent had placed in the *Letaba Herald* of 16 August 2002 a photograph of Van Schalkwyk, the respondent and her staff members was published under the heading 'Your One Stop Legal Centre'. In this advertisement Van Schalkwyk was described as someone with '12 years' experience in third party claims'. He was a member of her 'indispensable winning team' (my translation). Van Schalkwyk also had a business card of the respondent's firm describing him as a 'third party claims consultant'.

[9] The respondent said that she had appointed Van Schalkwyk and, later, Swanepoel with limited instructions: to visit accident scenes, take photographs, compile reports, and visit SAPS offices and hospitals to collect documentation. As a single practitioner she had difficulty in obtaining information herself: often clients resided in rural areas and had to be taken for medico-legal examinations. Van Schalkwyk, particularly after Swanepoel was appointed, became more office-bound and dealt with queries from the Road Accident Fund: he only answered questions from the Fund and made inquiries. In other words, he performed administrative work only. His name, she admitted, sometimes appeared on her letterheads. But, as the court below found, Van Schalkwyk's statements of account suggest that he had been engaged in work of a professional nature. One encounters claims for work such as 'merit investigation travelling expenses', 'taking witness statements', 'advice on merits', 'determining merits', 'instructions to commence third party claim', 'consultation with RAF', 'calculation of claim' and 'preparation of required reports' (my translations).

[10] The minutes of a staff meeting of the third party department of the respondent's firm held on 5 October 2005 is revealing. The following instructions

were given to the department: 'When Van Schalkwyk or Swanepoel give an instruction to Llandi (the candidate attorney) it has to be done on their forms and dated.' It was further minuted that 'Basie will assist Anton [the professional assistant] with the particulars of claim. Sonette will give Basie 'skeletons' on which he can work. Anton will thereafter check the particulars of claim . . .' (my translation). Swanepoel was to assist Llandi to keep her 'prescription file' up to date. It was emphasised that the respondent, Van Schalkwyk and Burger were to co-operate when a matter proceeded to trial. Burger was generally to negotiate with attorneys but Burger was to inform Van Schalkwyk when the latter had to do so. These minutes show a far greater involvement by Van Schalkwyk in the respondent's professional work than that professed by her. He most certainly did not function in the same way as a third party typist, collections clerk or conveyancing typist, as the respondent suggested.

[11] The respondent admitted that as the work increased Swanepoel was employed to be of assistance in calling on police stations and hospitals and in transporting clients. Swanepoel's remuneration, she said, was limited to an amount of R1 500 per case from which certain disbursements were to be made. Any further payments to him were to wait until the claim was paid. However, as the court below found, in a letter of 4 November 2005 addressed to Swanepoel the respondent expressly referred to an amount of R387 550 paid to him for 'Monies paid in respect of claims purchased'. From this sum an amount was deducted in respect of 'Monies received back in respect of claims purchased' and an amount was added relating to travelling expenses, dockets, hospital records and medical expenses, leaving a total of some R442 595 owing to him. Her evidence was that she pleaded guilty on advice of her counsel because she had used the words 'claims purchased' ('eise gekoop') in error in this letter. Seen in the light of Swanepoel's evidence and the separate accounting in respect of disbursements, her contention that she did not 'purchase' claims was correctly rejected by the court below. It is also not borne out by the schedule of outstanding files attached to her letter of 4 November 2005 which shows that amounts were paid to Swanepoel without any payments having been made by the Road Accident Fund. Moreover, the respondent never during the disciplinary hearing disputed that she had 'purchased' third party claims for R1 500 per claim. In fact, her counsel at the hearing conceded it. The letter also shows that an amount of

some R430 429 had been paid to Van Schalkwyk but no further particulars of these payments were supplied by the respondent.

[12] The court below did not specifically deal with the evidence supporting the charge that the respondent shared fees with Van Schalkwyk. To my mind her repeated denials under oath that this was not so cannot be accepted. In her affidavit responding to the rule 101 report, she did not address the evidence of Van Schalkwyk before the disciplinary committee, nor the finding that they had agreed on a 50:50 split of the fee in every third party matter. She pleaded that she was ignorant of the 'Mandate and Fee Arrangement' Van Schalkwyk presented to clients for signature and only became aware of it after he had left. In this document the client agreed that JM Assessors, that being the name of Van Schalkwyk's business, would be entitled to collect 25 per cent of the capital amount from the respondent's firm on completion of the third party claim. However, in a schedule to her letter of 4 November 2005 reference is made to a client's file with the annotation that 'Basie's mandate' was the only document on file. Moreover, the respondent, despite her denial of sharing fees with Van Schalkwyk, stated in her answer to the appellant's replying affidavit that, when she became aware that he had charged her 12,5 per cent of the capital amount of each claim, she had made enquiries with the appellant, and was informed that she could charge 25 per cent of the capital amount as a fee. She obtained a copy of a draft contingency fee agreement from the appellant on which she based her own agreement with clients. Because Van Schalkwyk had rendered good service she continued to pay him 12,5 per cent of the contingency fee. She said that she had continued to do so on condition that he delivered an account to her. However, she stated that although Van Schalkwyk was not entitled to 12,5 per cent, she was nevertheless prepared to share her fee with him. In some cases his fee was not enough but in others it was more than sufficient. Both of them were satisfied with the arrangement. This places it beyond any doubt that the respondent and Van Schalkwyk had agreed to share fees and that they did in fact do so. Individual payments made to him reflect this arrangement.

[13] It follows that all five charges against the respondent were proved. The evidence shows that over a considerable period of time, from 2002 until the end of 2005, the respondent touted for third party work, referred work reserved for an

attorney to Van Schalkwyk and Swanepoel, acted for clients who were introduced by them and shared fees and an office with Van Schalkwyk. The court below accepted that the respondent was dishonest in circumventing s 19(*c*) of the Road Accident Fund Act 56 of 1996 and by touting and charging clients for the fees of the touts. It implicitly found that she was not a fit and proper person to practice as an attorney. It then posed the question whether the respondent was 'so unfit and improper a person to continue to practice as an attorney as to necessitate her removal from the names of attorneys?' As I have said, however, s 22(1)(*d*) of the Attorneys Act envisages either the striking off or suspension of the attorney in question. The court below for the reasons referred to below decided to merely suspend the respondent from practice for one year and, moreover, suspended its order for three years on certain conditions. To my mind the court erred in making this order.

[14] The decision whether an attorney who has been found unfit to practice should be struck off or suspended is a matter for the discretion of the court of first instance. That discretion is a 'narrow' one:[3]

'The consequence is that an appeal court will not decide the matter afresh and substitute its decision for that of the court of first instance; it will do so only where the court of first instance did not exercise its discretion judicially, which can be done by showing that the court of first instance exercised the power conferred on it capriciously or upon a wrong principle, or did not bring its unbiased judgment to bear on the question or did not act for substantial reasons, or materially misdirected itself in fact or in law. It must be emphasised that dishonesty is not a *sine qua non* for striking-off.'

[15] In coming to its decision the court below emphasised several considerations. It relied on the fact that Van Schalkwyk had approached the respondent and that she did not, as it was put in the judgment, go 'all out to look for touts'. Her books of account were also properly kept and there was no shortage in her trust account. Nor had any allegation of misappropriation been made. She co-operated, the court said, with the investigator appointed. The scale on which the respondent conducted the third party work, the court added, could not be compared with the extent of the wrongdoing in *Malan's* case.[4] Moreover, her plea of guilty and the public humiliation

3 *Botha v Law Society, Northern Provinces* 2009 (1) SA 227 (SCA) para 3; *Malan & another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) para 13.
4 *Malan & another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA).

suffered coupled with the fact that the employment of the touts was terminated justified consideration. She had not, the court said, broken every rule 'in the book' as had happened in *Malan's* case. She also practised since the investigation in 2005 without any further disciplinary action against her. The court added that Van Schalkwyk was not impartial and could well have exaggerated his version of events, and, in any event, there had been proper oversight over him although the extent of his work had not been proved. The court also found that the instructions given to Swanepoel were limited to canvassing for clients, the obtaining of a power of attorney and a copy of the client's identity document. Any dishonesty by circumventing ss 19(*c*) [and (*d*)] of the Road Accident Fund Act 56 of 1996 and by touting was limited. Nevertheless, despite finding that the respondent had been dishonest, the court below found that the reasons set out constituted exceptional circumstances, justifying a departure from the general approach,[5] that where dishonesty was involved removal from the roll should follow.

[16] I am of the view that the court below materially misdirected itself in ordering the suspension of the respondent and not her striking off the roll of attorneys. It did so by comparing the matter *in extenso* with *Malan's* case and deciding that, because the scale of wrongdoing in *Malan* was so much greater, a lesser penalty in this case was justified. Comparisons are odious and, as was stated by Harms ADP in *Malan*, '[f]acts 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.'[6] The question is not whether this case is as serious as *Malan's* but whether, or if appropriate when, an attorney should be permitted to continue in practice.[7]

[17] There are also other misdirections to which I will refer. But first a word on the nature of the disciplinary process. In *Prokureursorde van Transvaal v Kleynhans*[8] Van Dijkhorst J said that in that process the court is engaged in an investigation of a disciplinary nature. It is a procedure *sui generis*. From this it follows that –

'van 'n respondent verwag word om mee te werk en die nodige toeligting te verskaf waar

5 *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA) para 21 and see *Malan & another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) para 10.
6 Para 9.
7 *Law Society Cape v Peter* 2009 (2) SA 27 (SCA) para 28.
8 *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 853G-H.

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.'

These remarks were echoed in *Law Society, Northern Provinces v Mogami & others:*[9]

'Very serious, however, is the respondents' dishonest conduct of the proceedings. Instead of dealing with the issues they launched an unbridled attack on the appellant. It has become a common occurrence for persons accused of wrongdoing, instead of confronting the allegation, to accuse the accuser and seek to break down the institution involved. This judgment must serve as a warning to legal practitioners that courts cannot countenance this strategy. In itself it is unprofessional.'

[18] The conduct of the respondent in defending the charges brought against her was wholly unsatisfactory. She attacked the appellant for referring to further complaints against her, accused it of unprofessional and unethical conduct, and sarcastically questioned its ability to distinguish between different kinds of offers of settlement. This was uncalled for. But the matter goes further. Far from disclosing at the outset fully and openly all the circumstances of her relationship with Van Schalkwyk and Swanepoel, the truth emerged only gradually. Initially she repeatedly denied that she and Van Schalkwyk shared fees. It was only in her affidavit responding to the appellant's replying affidavit that she admitted that this had occurred. But her admission was not unconditional but an attempt to justify her actions in some or other way. She admitted to Ms Geringer that Van Schalkwyk at some or other stage had shared an office with her. He did and indeed kept the third party files there. In her answering affidavit, however, she emphatically denied that this had been the position. But she admitted in her affidavit responding to Ms Geringer's report that Van Schalkwyk came and went to her offices as he liked until she stopped him in 2005. The minutes of the staff meeting of 5 October 2005 make clear references to Van Schalkwyk's office. Her denials that he had an office are simply not credible. The respondent denied that she had 'purchased' third party claims. She denied that she had advertised the services of Van Schalkwyk. She denied, during her interview with Geringer, that she had paid the touts employed by her. All these denials have been shown to be untruthful. She never informed the

9 *Law Society, Northern Provinces v Mogami & others* 2010 (1) SA 186 (SCA) para 26.

court of the real extent of the third party work undertaken by her firm, the fees earned and amounts paid to her touts. The fact that her trust account was properly kept is irrelevant. Her plea of guilty does not assist her for she attempted to withdraw it. It has been observed that '[t]he attorney's profession is an honourable profession, which demands complete honesty and integrity from its members.'[10] The various defences and the manner in which they were raised by the respondent cannot be said to evince complete honesty and integrity. The court below misdirected itself by not considering these factors.

[19] All the charges should be considered together. They are all interlinked. They show serious misconduct. Touting has always been considered a serious form of misconduct: it is something that should be eradicated.[11] The respondent employed two touts, paid them for touting and allowed them to do professional work. She shared her office and fees. Some 300 cases were involved. Large amounts were paid to the touts, more than R800 000. The continued denial by the respondent of any misconduct reveals a lack of understanding of her own conduct. This all demonstrates that it cannot be assumed that she will, after a period of suspension, be a fit and proper person to continue practice as an attorney. The only suitable sanction is the removal of her name from the roll of attorneys. No exceptional circumstances have been shown to justify a lesser penalty.

[20] The high court made no order as to costs and gave no reason for its failure to do so. It failed to take into consideration the appellant's statutory duty to approach the court. It did not do so as an ordinary litigant. The general rule is that it is entitled to its costs, even if unsuccessful, and usually on the attorney and client scale.[12]

[21] In the result the following order is made:

1 The appeal is upheld with costs.

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

'An order is made in terms of prayers 1 to 12 of the notice of motion.'

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10 *Summerley v Law Society of the Northern Provinces* 2006 (6) SA 613 (SCA) para 21.

11 *Cirota & another v Law Society, Transvaal* 1979 (1) SA 172 (A) at 192C-D; *KwaZulu-Natal Law Society v Davey & others* 2009 (2) SA 27 (N) para 171.

12 *Law Society, Northern Provinces v Mogami & others* 2010 (1) SA 186 (SCA) para 31.

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F R MALAN
JUDGE OF APPEAL

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