THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 786/12

In the matter between: Not Reportable

JOHANNES TLHOALELA MAFOKATE **Appellant**

and

THE LAW SOCIETY OF THE NORTHERN PROVINCES **Respondent**
(Incorporated as the Law Society of the Transvaal)

Neutral citation: *Mafokate v The Law Society of the Northern Provinces* (786/12) [2013] ZASCA 125 (23 September 2013)

Coram: Mthiyane AP, Lewis, Shongwe and Wallis JJA and Zondi AJA

Heard: 20 August 2013

Delivered: 23 September 2013

Summary: **Attorney – misconduct – appropriate order – failure to account to clients – absence of accounting records – adequacy of explanation – evidence presented to be subjected to proper analysis – striking off order does not follow as a matter of course from the finding that the attorney is not a fit and proper person to continue practice – absence of exceptional circumstances in favour of the appellant.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Mavundla J and Goodey AJ, sitting as court of first instance):

The appeal is dismissed with costs, on the attorney and client scale.

JUDGMENT

Zondi AJA (Mthiyane AP, Lewis, Shongwe and Wallis JJA concurring):

[1] This is an appeal against the judgment and order of the North Gauteng High Court, (Mavundla J and Goodey AJ) striking the appellant's name from the roll of attorneys with costs on attorney and client scale and granting certain ancillary relief. The appeal is with the leave of the court below.

[2] The appellant practises in Johannesburg as a sole practitioner under the name of J T Mafokate and Associates. He was admitted as an attorney in November 1989. In November 2007 the respondent brought an application in the court below in terms of s 22(1)(*d*) of the Attorneys Act 53 of 1979 for the striking of the appellant's name from the roll of attorneys. In the founding affidavit by the president of the respondent it was alleged that the appellant was guilty of unprofessional, dishonourable and unworthy conduct and was consequently no longer a fit and proper person to continue to practise as an attorney. This allegation was made on the basis of two complaints that the appellant had settled claims against the Road Accident Fund (the Fund) but not accounted fully and properly to his clients for the proceeds of those claims. The appellant opposed the application and filed an affidavit in which he disputed the charges against him. Alternatively, he submitted that if the charges were established the court should not strike his name off the roll of attorneys, but should rather impose a lesser form of punishment.

[3] In view of the fact that the court below, in its treatment and analysis of the factual matrix for the purposes of deciding whether or not the appellant was a fit and proper person to continue to practise as an attorney, did not evaluate the appellant's version as well as his explanations, it is convenient to deal briefly with each alleged contravention and the appellant's response thereto. The court below should have subjected the evidence to analysis due to the nature of the enquiry involved in the proceedings under s 22(1)(*d*) of the Act. As was pointed out by Harms DP in *Law Society, Northern Provinces v Mogami*,[1] an application of this nature involves a three-stage enquiry. First, the court must determine whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual enquiry. The second enquiry is whether the person concerned is 'in the discretion of the court' not a fit and proper person to continue to practise. The exercise involves the weighing-up of the conduct complained of against the conduct expected of an attorney and, to this extent, is a value judgment. The third enquiry is whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order suspending him or her from practice for a specific period will suffice.[2] The value judgment which the court must make in s 22(1)(*d*) of the Act must be based upon the facts placed before it[3] and in my view must account for all the evidence.

[4] This application to strike the appellant from the roll of attorneys arose as a result of the alleged contraventions by the appellant of the respondent's relevant rules uncovered by the respondent's legal official during an investigation of the appellant's practice. This investigation followed a complaint lodged with the respondent against the appellant by Mr Samuel Muchanga also known as Piet Mabitsela, a client of the appellant. The complaint was that he had instructed the appellant to lodge a third party claim against the Fund and that the appellant had failed to account to him for the monies the appellant received on his behalf.

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[1] *Law Society, Northern Provinces v Mogami* 2010 (1) SA 189 (SCA) para 4.
[2] *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA); *Malan & another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) para 10; *Botha & others v Law Society, Northern Provinces* 2009 (3) SA 329 (SCA) para 4.
[3] *Law Society of the Cape of Good Hope v C* 1986 (1) SA 616 (A) at 637D-G.

[5] As a result of Muchanga's complaint and the respondent's legal official's report the respondent decided to institute a disciplinary enquiry against the appellant to answer certain charges. The appellant duly appeared before the disciplinary committee constituted by the respondent. But Muchanga did not attend. Due to Muchanga's non-attendance the disciplinary committee converted the proceedings into an investigation to discuss Muchanga's complaint with the appellant. The disciplinary committee was not satisfied with the appellant's explanations for his failure to account to Muchanga. It referred the matter to the respondent's council with a recommendation that the council should consider bringing an application for the striking of the applicant's name from the roll of attorneys or for his suspension from practice. The present application ensued.

[6] It is common cause that Muchanga instructed the appellant to lodge a third party claim against the Fund on his behalf. The Fund settled the claim in an amount of R392 240 which was paid into the appellant's trust banking account on 2 February 1998.

[7] In January 2006 Muchanga complained to the respondent, alleging that the appellant had failed to account to him for the amount the appellant received from the Fund and further that one of the appellant's cheques he issued to him was dishonoured by the bank when he presented it for payment.

[8] The appellant admitted that he had received from the Fund the sum of R392 240 in settlement of Muchanga's claim, but blamed the delay in furnishing Muchanga with a written statement of account and paying the amount due to him on Muchanga's change of personal details. The appellant alleged that when he initially received instructions from Muchanga, the latter was then known as Malesela Piet Mabitsela. When he consulted with Muchanga on 8 May 1999 for the purposes of paying the money due to him, Muchanga requested him not to give him a lump sum payment as he would not be able to open a bank account. Muchanga informed him that he had lost his identity document and had applied for a new one. Muchanga requested the appellant to delay payment to him until he had obtained a new identity document and had an opportunity to discuss payment details

with a member of his community. Muchanga requested the appellant to give him R1000 in the meantime, which the appellant did.

[9] In about March 2001 Muchanga informed the appellant that he was in possession of a new identity document and requested the appellant to finalise his statement of account. The appellant said that when he perused the identity document which Muchanga presented to him, he observed that Muchanga's personal details in the new identity document differed substantially from those reflected in his old identity document. In the new identity document Muchanga was identified as Samuel Muchanga and no longer as Malesela Piet Mabitsela. His country of birth was no longer South Africa but had changed to Mozambique. Furthermore his date of birth had changed. The appellant suspected that something was amiss and had to investigate the matter. He requested Muchanga to furnish him with a letter from the Department of Home Affairs (Home Affairs) to confirm that it was aware of the changes in Muchanga's personal details. Nothing happened until December 2001 when Muchanga showed the appellant a letter from Home Affairs confirming the changes in Muchanga's personal details. The appellant said this letter looked suspicious to him. He decided to verify its authenticity. He contacted a certain Mr Mohlala of Cullinan Home Affairs to verify claims that Muchanga's personal details had been validly changed. Mohlala informed the appellant that Home Affairs had 'no record on computer which showed that (Muchanga) did apply to change his particulars.' I should point out that these allegations have not been confirmed by Mohlala.

[10] According to the appellant, Muchanga's identity document issue remained unresolved at least until 26 August 2005 when the appellant last saw him. The appellant said during the period May 1999 to August 2005, he had various interactions with certain Home Affairs officials, the purpose of which was to verify the authenticity of the identity document which Muchanga gave to him in March 2001, for the purposes of releasing the balance due to him. The appellant alleged that during this period he would from time to time, at Muchanga's request, pay Muchanga various sums of money.

[11] The appellant alleged further that by March 2005 'the total amount which was due to Muchanga had … been fully paid to him' and in support of this allegation he annexed to his answering affidavit a payment schedule prepared by him in which it is indicated that an amount of R45 899.31 was paid to third parties on behalf of Muchanga; R124 750 to Muchanga and R178 158.63 debited as fees respectively. Even accepting these figures at face value this left an amount of some R50 000 unaccounted for.

[12] Muchanga denied that the appellant's delay in paying him and in furnishing him with a statement of account was as a result of the changes in his personal details in his identity document. He alleged that he changed his personal particulars in the year 2000 and that to his knowledge his new identity document was valid. According to him he did not instruct the appellant to investigate the validity of his identity document.

[13] I proceed to deal with the appellant's explanation for the delay in finalising Muchanga's statement of account and paying what was due to him. That during the period May 1999 to August 2005 certain sums of money were paid to Muchanga is not in dispute. What is in dispute is the amount paid to Muchanga and why payment was made intermittently. It appears from a schedule of payments made to Muchanga between May 1999 and March 2005 that some of these payments were made by cheque. Between the period 6 June 2003 to 6 December 2003 three cheques were issued by the appellant. These cheques were payable to either S Muchanga or Piet Mabitsela. The question is why would the appellant issue cheques to Muchanga if Muchanga's identity document problem was still an issue? In my view what these facts demonstrate is that at a certain point in time Muchanga's identity document problem ceased to be an impediment for the appellant to finalise payment to Muchanga. Therefore, to the extent that the appellant seeks to rely on it as an excuse for not paying what was due to Muchanga, such reliance is contrived and falls to be rejected.

[14] If the appellant's allegation is correct, that by March 2005 the total amount due to Muchanga had been fully paid to him, then there is no plausible explanation as to why the

appellant issued to Muchanga a trust cheque in the sum of R24 000 on 25 August 2005, on which cheque he subsequently put a stop payment notice. It is difficult to reconcile the appellant's averment with the objective facts as set out in one of the appellant's accounting documents which indicates that as at 29 February 2004 Muchanga's trust ledger account had a nil balance. This fact contradicts the appellant's assertion that funds in Muchanga's account were exhausted by March 2005. In fact these records demonstrate that funds in Muchanga's account were exhausted much earlier than March 2005. In the circumstances the fees which were generated by the appellant after 29 February 2004 could not have been debited to Muchanga's trust ledger account as at that stage it had a nil balance, unless he assumed that there were still funds available in Muchanga's account post 29 February 2004 which is not the appellant's case.

[15] I have given proper and serious consideration to the appellant's explanation together with supporting documentary evidence and I have come to the conclusion that the appellant failed to account properly to Muchanga. I find therefore that the respondent has succeeded in establishing on a balance of probabilities that the appellant's delay in paying, and accounting to, Muchanga was without a lawful excuse and he contravened rules 89.7 and 68.8 of its rules.

[16] I now turn to deal with Busang's complaint that the appellant failed to properly account to him. It is common cause that on 13 September 1995 Busang instructed the appellant to prosecute on his behalf a third party claim against the Fund. The claim was settled in 2002 and the Fund paid R60 000 into the appellant's trust account. Later it paid a further amount of R41 999.35 in respect of costs. The appellant denies the allegations against him. His explanation is the following: On the 13 September 1995 he received instructions from Busang to prosecute a third party claim on his behalf. On 7 October 1995 and 9 January 1996 respectively he lent two amounts, each of R20 000 to Busang at the latter's request. He said Busang instructed the appellant to deduct the sum of R40 000 from the amount he expected to receive from the Fund. Since there are no underlying documents reflecting the loan and the payment of the two advances of R20 000 each to Busang, the appellant presented copies of allegedly contemporaneous notes extracted

from Busang's file as proof of the loan and payment of R40 000 pursuant thereto. Upon settlement of Busang's claim he sent to Busang a letter dated 9 October 2002 enclosing a statement of account confirming the receipt of R60 000 from the Fund. The statement of account referred to in that letter indicated that there was a shortfall that he hoped would be covered by way of the recovery of costs from the Fund.

[17] The appellant claimed that as agreed with Busang, he deducted R40 000 and fees and disbursements in the sum of R100 356.73 plus Vat of R3 720.92 from the amounts received from the Fund. As the total amount received from the Fund was insufficient to meet the loan and fees the result was that Busang still owed him R2 078.29. The appellant alleged that he addressed a letter to Busang on 9 October 2003 requesting Busang to come and see him. However, the letter did not enclose an account or mention the alleged shortfall. The appellant said that when Busang failed to respond to his invitation, he telephoned Busang and arranged an appointment with him. During their telephonic discussion, Busang told him that he went to see the appellant but could not find the place to which the appellant's firm had relocated. He told Busang where his firm was and arranged another appointment with him which Busang again failed to honour.

[18] Busang denied that he received an advance of R40 000 from the appellant. He also denied having received the appellant's letters of 9 October 2002 and 9 October 2003. In his complaint affidavit Busang alleged that he received nothing from the settlement amount paid by the Fund. He said he made several appointments with the appellant, which the appellant never kept. He further said the appellant informed him that he had moved his practice to a Bryanston address which according to Busang does not exist.

[19] The appellant's version that he paid Busang R40 000 pursuant to a loan agreement with him and the reason advanced for the delay in accounting to Busang, are rejected. First, there is no documentary proof to substantiate the payment of R40 000 and the appellant does not state how the two payments of R20 000 each were made. Second, the circumstances in which these payments were made raise some serious doubt. The first

one was allegedly made on 7 October 1995, that is just a month after the receipt of instructions to prosecute a third party claim. At that stage the appellant had not even received a police report which could have served as a basis for conducting an assessment of the merits of the claim. Moreover, when the second payment of R20 000 was allegedly made a medical report concerning the nature and extent of injuries sustained by Busang was not available. In my view, having regard to the amount of the alleged loans, which is not insignificant, it is highly unlikely that the appellant would have advanced funds to Busang at a stage when he had not satisfied himself as to the prospects of success of Busang's claim, which he could not have done in the absence of a police report and a medical report. As far as the appellant's explanation is concerned regarding Busang's failure to see him in October 2003, it is not clear from the documents filed, when exactly the appellant moved offices from Johannesburg to Bryanston. He claimed that he had moved in September 2002. But the letterhead on which he wrote the letters of 9 October 2002 and 9 October 2003 respectively indicate a different address. Busang's allegation that he could not find the appellant's firm at the address at which the appellant said it was, is much more probable having regard to the inconsistencies and contradictions in the appellant's explanations. Accordingly, the high court's finding that the appellant was guilty of unprofessional, dishonourable and unworthy conduct, cannot be faulted.

[20] The next question is whether the appellant is a fit and proper person to continue practising as an attorney. It was submitted on behalf of the appellant that there exists no basis for the finding that the appellant is not a fit and proper person to continue to practise as there is no evidence that he deliberately stole money from the trust account. In our view, this submission misses the point. The question is not that the appellant stole from the trust account, the question is whether the appellant accounted to Muchanga and Busang for the moneys he had received on their behalf from the Fund. The evidence is overwhelming that he failed in this regard. The appellant's explanations in relation to Muchanga and Busang's complaints are replete with contradictions, inconsistencies and improbabilities and are so far-fetched that they have only to be stated to be rejected. In my view the appellant is guilty of unprofessional conduct which in the circumstances of the matter renders him unfit to continue to practise as an attorney. This finding does not,

however, necessarily mean that the appellant's name should be struck from the roll of attorneys.[4] In other words, removal does not follow as a matter of course. The appellant may be suspended from practice for a given period if upon consideration of all the facts the court finds that after a period of suspension the appellant will be fit to practise as an attorney.

[21] As pointed out in the *Malan* and *Jasat* cases supra, the sanction is also a matter for the discretion of the court of first instance. Whether a court will suspend or strike the attorney's name from the roll 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 or her to be unworthy to remain in the ranks of the profession, the likelihood or otherwise of a repetition of such conduct and the need to protect the public. In relation to the sanction it was submitted on the appellant's behalf that if this court should find that there are certain instances where the conduct of the appellant was questionable then he should be suspended from practice having regard to his age, the fact that he has been an attorney for 24 years and the effect the striking off order will have on his future prospects. There is no doubt in my mind that in determining what an appropriate sanction will be in this matter one should not turn a blind eye to the effect of a removal of the appellant from practice. It constitutes a severe penalty as the appellant will be precluded from practising his profession for a substantial period of time.[5] I have already pointed out that the judgment of the high court contains no evaluation of the evidence which formed the basis of its finding that the appellant's unprofessional conduct rendered him unfit to continue to practise as an attorney. The clear impression I have is that the matter was approached on the basis that the striking off follows as a matter of course once a finding is made that the appellant was guilty of unprofessional conduct. That approach is not permissible.[6] This being the case this court is at large to reconsider the sanction.

[22] It has been said that the law exacts from any attorney *uberrima fides* – the highest

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[4] *Malan & another v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) para 10.
[5] *Summerley v Law Society of the Northern Provinces* 2006 (5) SA 613 (SCA) para 18.
[6] See *Malan*, supra.

possible degree of good faith – in his or her dealing with his or her clients which implies that at all times his or her submissions and representations to his or her clients must be accurate, honest and frank.[7] The totality of evidence in the present matter reveals that the appellant was less than transparent in his dealings with Busang and Muchanga. There was delay, which has not been satisfactorily explained, in accounting to them. In relation to Busang the appellant was unable to produce proof of payment of R40 000: providing such proof, if payment was indeed made, would not have been difficult. Similarly, in relation to Muchanga, because of the lack of proper accounting records for the relevant period, it is not easy to establish from the documentation provided by the appellant exactly how much was paid to Muchanga. This is because some of the amounts are duplicated and others inflated. For instance one schedule of payments made to Muchanga indicates that an amount of R1 500 was made in March 2003 while the other indicates an amount of R15 000 having been made. These are the disturbing features in the present matter.

[23] I have given serious consideration to the appellant's personal circumstances which, it was submitted on his behalf, constitute sufficient basis for this court to order suspension rather than the removal of his name from the roll. In my view, they do not constitute exceptional circumstances to justify the imposition of a lesser penalty.[8] The facts in the present case differ from those in *Law Society of the Cape of Good Hope v Peter*,[9] in which exceptional circumstances were found in her favour justifying imposition of a lesser sentence. There a suspension order was found appropriate because of the respondent's frank and full disclosure, accepting responsibility for her conduct and the short duration and limited nature of her misconduct. In these circumstances there exists no ground for this court to assume that after the period of suspension the appellant will be fit to practise as an attorney. Accordingly a suspension order is inappropriate. It follows that the court below did not err in the exercise of its discretion.

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[7] *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T) at 396.
[8] *Law Society of the Northern Provinces v Sonntag* 2012 (1) SA 372 (SCA) para 19.
[9] *Law Society of the Cape of Good Hope v Peter* 2009 (2) SA 18 (SCA) para 14.

[24] In the result the appeal is dismissed with costs, on the attorney and client scale.

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D H Zondi

Acting Judge of Appeal

APPEARANCES

For Appellant:	J K Wessels
	Instructed by:
	J T Mafokate, Johannesburg;
	Mabalane Seobe Inc, Bloemfontein
For Respondent:	J J Buys
	Instructed by:
	Stegmanns Inc, Pretoria;
	Claude Reid, Bloemfontein