

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: **A13/2019**

In the matter between:

FS MACHEKA

Applicant

and

THE STATE

Respondent

CORAM: **MHLAMBI, J et CHESIWE, J**

HEARD ON: **06 MAY 2019**

DELIVERED ON: **29 AUGUST 2019**

JUDGEMENT BY: **CHESIWE, J**

- [1] The appellant is a 50 year old male and was charged with two counts. Count 1 of Theft and Count 2 of Money Laundering. The appellant pleaded not guilty and was found guilty on Count 1 and acquitted on Count 2. He was sentenced to an effective 30 months imprisonment in terms of section 276 (1)(i) of the Criminal Procedure Act 51 Of 1977.
- [2] The appellant was legally represented by Mr Swanepoel.
- [3] The trial court granted leave to appeal on conviction and sentence. The appellant was represented by Adv. Van Rensburg and the respondent was represented by Adv. Ponye.
- [4] The appellant's grounds of appeal are based on the following: that the Presiding Officer erred by failing to make both legal and factual findings that required the appellant to be furnished with full and proper details and the further particulars to the charges brought against him in order to prepare for the trial; and that the Presiding Officer infringed on the appellant's rights to a fair trial.
- [5] The appellant made several applications at the trial court which will not be dealt with in this judgement as the trial court dealt thoroughly with the applications before it.
- [6] Background on this matter is briefly summarised as follows: The appellant was an attorney practising under the name and style of Fusi Macheka Attorneys in the Free State area. The appellant

held a Trust Account at Standard Bank with account number [...] in the name of Fusi Macheka Incorporated. The complainant (Elizabeth Kimane) was involved in a motor vehicle accident on or about June 2016. She made an appointment with the appellant after the accident in order to arrange a consultation to claim from the Road Accident Fund (RAF). The appellant requested that the complainant to pay R300.00 in order for a file to be opened, which payment was made and followed up by another amount of R200.00.

[7] On 26 February 2016 the complainant was called by the RAF office and informed that an amount of R49 702 .45 was paid into the bank account of Fusi Macheka Attorneys. She was told by the RAF official to go to the RAF office at the Bongani Hospital, Welkom, in order to obtain proof of the payment. The complainant went back to the appellant's office to enquire about the payment of R49 702.45. She was informed that Mr Macheka was not at the office and she later met the appellant at the office of the investigating officer, accompanied by her legal representative Mr Coetzer. In the presence of the complainant with her legal representative and the appellant, an acknowledgement of debt was signed by the parties. The complainant, after signing the acknowledgement of debt, did not receive any payment in terms of the said acknowledgement of debt. The complainant was eventually paid by the Attorneys Fidelity Fund (as it then was).

[8] I pause to mention that the appellant was struck off the roll of Attorneys by this Honourable High Court on 23 June 2011.

However, this is not the issue before the appeal court and will therefore not be dealt with.

- [9] Counsel on behalf of the appellant, in both oral argument and the Heads of Argument, submitted that Fusi Macheka Inc. was liable for the loss suffered by the Complainant. He mentioned that the Law Firm had more than one person who had access to the trust accounts. He submitted that theft in the trust accounts is looked at differently than common theft. He submitted that the state did not prove beyond reasonable doubt that the appellant stole the money. He submitted that the appellant may be guilty by having being reckless and mismanaged the trust funds, but cannot be held liable for that recklessness and submitted that the appeal on conviction and sentence be upheld.
- [10] Counsel on behalf of the respondent submitted in oral agreement that the appellant was the one who dealt with the complainant. The money in the trust account belonged to the complainant and the appellant cannot transfer money on trust accounts without a claimant's permission. He further submitted that it is improbable that the appellant allowed people in the Law Firm to have access to the PIN of the electronic funds transfer of the Trust Accounts. He submitted that the appellant failed to inform the complainant that the money from the Road Accident Fund had been paid. He further submitted that the Trust Account had no liquid funds to pay the complainant. It therefore follows that the appellant used the Complaint's money for his own benefit and interest.

[11] Theft is defined as:

“A person commits theft if he unlawfully and intentionally appropriates movable, corporeal property which:

- (a) Belongs to, and is in the possession of another;*
- (b) Belongs to another but is in the perpetrator’s own possession; or*
- (c) Belongs to the perpetrator but is in another possession and such other person has a right to possess it which legally prevails against the perpetrators over right to possession;*

Provided that the intention to appropriate induces an intention permanently to deprive the person entitled to the possession of such property.”

[12] In **Hirschowitz Flionis vs Bartlet and Another**,¹ the SCA in considering whether or not there was a legal duty on an attorney to deal with funds in their trust account without negligence, stated that:

“A Practising Attorney has a legal duty when dealing with money in trust account and insufficiently informed as to the identity of the depositor or the purpose of the deposit.”

[13] In this instance the appellant, being a firm of practising attorneys, proclaimed to the public that it possessed the expertise and trustworthiness to deal with trust money reasonably and responsibly. The complainant in this case relied on the fact that the money would be safe in the appellant’s trust account, until instructed otherwise. In **Hirschowitz supra** the court mentioned that even where an attorney discovered an anonymous and unexplained deposit, it requires minimal management to transfer the money to a trust suspense account. Thus any unreasonable conduct that

¹ 2006 SCA 24 (RSA) at para 36.

might put the money at risk, would as reasonable foreseeability, cause loss for the depositor or beneficiary. The legal conviction of the community would undoubtedly clamour for liability to exist in the circumstances. It simply means that money in a trust account is not the attorney's property, and any deposit must be dealt with in accordance with the trust creditor's instruction.

- [14] The issues raised by the appellant was that he was not furnished with the further particulars, specifically with reference to the missing file of the complainant. The trial court dealt thoroughly with that issue and this is noted in Ms Obbes' testimony on page 323 of the transcribed record:

"Did you know all the offices of Mr. Macheka to confiscate files? Indeed so. I can remember that I went to the office in Welkom to confiscate or to basically attach the files, further process were done by Mr. Mohobo who is not in the employment of the law society anymore. But the process from the attachment of the files is that all the files are written into an index book that we received from the specific practitioner and then it is indexed so that we can know which files we have;

Ma'am there was an issue about the file of Ms. Kimane, does it appear in the index book? No it did not, it does not appear in the index book.

Copies of the index book were made available and from that it is clear that it did not appear in the index books. I cannot see any reason why the person doing the indexing would neglect to insert a specific file in the index books because there is no benefit to any person to do that. So I can, I can say that I am very positive that if we have received the file from Mr. Macheka then it would be in the index books."

- [15] Thus the application to compel by the Applicant for further particulars, in this instance the Kimane file, was correctly dismissed by the Presiding Officer, as the state could not furnish information it did not have in its possession. Ms. Obbes testified that the Law Society of the Free State (as it then was) had to bring a second application to this Honourable Court for more files which the appellant did not give to the Law Society after the first court order was granted to strike him off the roll.
- [16] The application in terms of section 174 was properly dealt with by the Presiding Officer. As the section provides that a court 'may' at the close of the case for the prosecution if it is of the opinion that no other evidence of which the accused be convicted of, return a verdict of not guilty. It is trite that the term 'no evidence' does not mean no evidence at all. The trial court applied the two stage enquiry. Firstly, whether there is evidence upon which a reasonable man acting carefully may convict and secondly, whether there is a reasonable possibility that the defence might supplement the state's case. In any view, the trial court, in refusing the section 174 application, took into consideration the evidence before it and correctly denied the application.
- [17] The appellant in order to pay back the complainant, signed an acknowledgement of debt, which he did not honour. In spite of the writ of execution having been served on him, the sheriff's return was a *nulla bona*. The inference drawn is that the appellant was unable to pay the debt, and as correctly stated by

Adv. Ponye, the appellant had no liquid funds to cover the amount owing.

[18] The transcribed record on page 70, volume one, shows that an amount of R30 914. 87 was brought forward on the law firm's bank statements. The Road Accident Fund deposited on 26 February 2010 an amount of R49 702.45 which brought the balance on the bank statement to R80 617,32 (i.e. R30 914, 87 + R49 702,45). A cash cheque to the amount of R20 000 was drawn on 26 February 2010 which is on the same date that the RAF deposited the amount of R49 702, 45. The balance was R60 609, 18. On 27 February 2010 an amount of R30 000 was transferred and this brought the balance to R31 291, 07. This is an indication that the money in the bank at that stage was already insufficient to pay the complainant. By 8 March 2010 the balance was R764.81 and this was a further indication that the appellant could not have been able to pay the complainant, as the cash available was not enough to do so.

[19] Practising attorneys know that trust funds are a valuable asset of any law practice and the trust funds do not belong to the attorney or any other person. Indeed it is a criminal offence to steal or take trust funds. An attorney (Legal Practitioner in terms of the Legal Practice Act) has a duty of care in respect of trust funds and this is well established in our law.

[20] A claim will lie against the Legal Practitioner whether the loss is caused by negligence or theft. Counsel on behalf of the appellant, submitted that the appellant may have acted recklessly or negligently by allowing other staff members to have access to the trust fund's bank account, and that he should not be convicted for such reckless conduct. I disagree with this view. The appellant, as the owner of the law firm, had a duty of care in respect of the trust funds entrusted to him or his law firm. In the matter of **Du Preez and Others v Zwiegers**,² the court held that: "an attorney is under a legal duty to deal with trust account money in such a way that loss is not negligently caused, inter alia, to the depositor."

[21] As early as in the 19th century, the courts were not lenient on persons who involved themselves in trust monies. In **Rex v Rorke**,³ Innes CJ said:

"These were trust monies; they were neither deposited with nor received by the appellant under the circumstances which constituted him the mere private debtor of the beneficiary. He could only deal with them properly and legally by handling them in the manner and them to the purposes prescribed by law. And if he deliberately appropriated them to his own use..... The jury were fully justified in concluding that such appropriation was fraudulent, and he committed the crime of theft."

[22] In the recent matter of **S v Boesak**,⁴ the SCA stated as follows: "where a person has been entrusted with money for purpose A uses such money for purpose B, or appropriates it for his own use. This presupposes that purpose A and purpose B are unrelated, or that there does not exist a

² 2008 (4) SA627 (SCA) at para 19.

³ 1915 AD 145 at 157.

⁴ 2000 (1) SACR 633 SCA.

sufficient nexus between them. The underlying ratio is that by using the money donated for purpose A for purpose B, the donor is being denied his say over the manner in which the money is dealt with. In effect he is deprived of his control over the money.”

[23] Section 78 of the Attorneys Act 53 of 1979, before it was repealed by the Legal Practice Act 28 of 2014, had measures in place to ensure and safeguard trust funds. The new Legal Practice Act, Chapter 7 thereof, also has measures in place to safeguard trust funds. Thus the Legislature had to put measures in place in order to avoid any attorney from abusing trust funds, for example, adequate internal controls are implemented to ensure compliance with the rules and to ensure that trust funds are safeguarded; these being designed to ensure that internal controls are appropriate to address an identified risk; that the effective operation of the internal controls is monitored regularly by designated persons in the firm.

[24] The appellant by virtue of his profession as an attorney, is expected to uphold the highest professional standards. It is unacceptable that a person who is to uphold these professional standards, is the person who commits the offence of theft of trust money. When an attorney is charged with theft, it is important for the Law Society to show a deficit in the trust account as well as conducting a proper audit of a law firm's books. In my view, the state at the trial court proved beyond reasonable doubt that the trust account of the appellant had a shortage, and the appellant could not give a proper explanation as to how the deficit and the trust shortfall arose. As correctly pointed out by Ms Obbes, none

of the staff of the Law Society had any reason to implicate the appellant, as none had any interest in the matter nor any expected benefits.

[25] It is trite law that a court of appeal will not tamper lightly with the trial court's credibility findings, considering the advantage which the trial court has of hearing and appraising the witnesses. It will do so, if it is shown that the findings made by the trial court were clearly wrong. It has not been submitted that the trial court committed any misdirection of fact. Furthermore, when consideration is paid to all inconsistencies, improbabilities and contradictions in the appellant's evidence, there is no reason to doubt the correctness of the credibility findings made by the trial court.

[26] As already mentioned above, the appellant had the highest professional standards to maintain. He had no right to access trust funds unlawfully. The problem of trust funds is so prevalent in the legal fraternity that the courts, on several occasions, had to deal with applications to strike off attorneys from the roll of practising attorneys. The Legislature enacted rules in terms of the Legal Practice Act 28 of 2014, specifically dealing with the handling of trust monies to ensure that there are internal control measures in place to avoid trust funds from being abused by the Legal Practitioners in private practice.

[27] I am satisfied that the state has proven its case beyond reasonable doubt. Furthermore, the trial court correctly found the

appellant to be an untruthful witness and correctly rejected his version as false beyond reasonable doubt. There is therefore no reason to tamper with the trial court's findings on the appellant's conviction.

[28] Counsel on behalf of the appellant in oral argument submitted that in view of the correctional report, the sentence proposed of correctional supervision would be more appropriate under the circumstances, as the appellant has already being punished by being struck off the Roll of Attorneys. He was also diagnosed with diabetes, high blood and Tuberculosis. His spouse is sick and has being diagnosed with cancer, even though this information was not substantiated with evidence or the production of any medical certificate at the trial court.

[29] Counsel on behalf of the respondent submitted that the theft of trust funds is a serious offence and the 30 months' custodial sentence handed down was actually too lenient. He submitted that the sentence of the trial court should not be tampered with as under circumstances as it is the appropriate sentence.

[30] As regards sentence, it is trite that a court with appellate jurisdiction has limited powers to interfere with the sentence imposed by the trial court. The sentencing discretion lies with the trial court and its sentence will be interfered with on appeal only if the discretion in question was not exercised judicially and properly⁵, or if there is disparity between the sentence imposed

⁵ S v Rabie 1975 (4) SA 875 (AD)

and the one that ought to be imposed. In *S v Malgas*⁶ the court stated as follows:-

“A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate” It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned.”

[31] It is evident from the record that the trial court properly considered the imposition of sentence. To the appellant’s credit, the trial court took into consideration the correctional report and sentenced the appellant to only 30 months’ imprisonment, which, as correctly stated by Adv. Ponye , is a very light sentence indeed. The trial court was actually of the view that the sentence

⁶ 2001 (1) SACR 469 (SCA) at 478 d-h

should have been more than the 30 months' imprisonment. However, the trial court took into consideration the prevalence of these offences of the theft of trust money into account. The State, at the trial court, called a Mr Letsholo (employed at the Fidelity Fund in the Risk Division) as a witness in respect of claims against the trust account of the appellant. This is noted on page 613, volume 4:

"Can you please tell this court. How many claims were laid against the trust account?.... In totality the Fund received 49 claims amounting to R1 765 269, 92. Okay, out of the 40 claims how many claims did the fund pay?.... 25 claims of those were paid were admitted and paid by the Fund to an amount of R1 131 790,92"

[32] It is further noted on page 615, volume 4 line 7, Mr Letsholo testified that the Fund in 2010 paid to members of the public an amount R70 864 968,11 and in 2011 the Fund paid R93 411 256,07 and in 2012 the Fund paid members of the public an amount R115 818 817,58. These are huge amounts that are lost through theft by members of the profession who do not respect public funds deposited into their trust accounts. Indeed this is unacceptable for such huge losses to occur due to greed, if I may put it so. It can be accepted that his deed was motivated by greed and not need. Significantly, his lack of remorse for his actions impacts negatively on his chances of rehabilitation. The aggravating factors far outweigh the mitigating factors. Having considered all these circumstances, I am satisfied that the trial court did not err or misdirect itself in any way. There is no reason to tamper with the sentence imposed by the trial court.

ORDER

[33] In the result, the following order is granted:

1. The appeal against both conviction and sentence is dismissed.

S. CHESIWE, J

I concur

JJ MHLAMB, J

On behalf of the appellant: Mr D Swanepoel
Instructed By: Messrs Du Randt and Louw
C/O Bokwa Attorneys
BLOEMFONTEIN

On behalf of the respondent: Adv. Ponye
Instructed By: Director of Public Prosecution
BLOEMFONTEIN