

Case no. 75/88

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

DONALD KGALAKE NKADIMENG

Appellant

and

THE LAW SOCIETY OF THE TRANSVAAL

Respondent

Coram: HOEXTER, NESTADT, KUMLEBEN, F H GROSSKOPF JJA et

FRIEDMAN AJA.

Heard:

Delivered:

31 August 1989.

22 September 1989

J U D G M E N T

F H GROSSKOPF JA:

The appellant was admitted as an attorney on 25 January 1977. He commenced practising in partnership under the name of Ngoepe and Nkadameng in Pietersburg. This partnership was later dissolved and as from 1 June 1981 the appellant practised on his own account under the name of Don Nkadameng in Pietersburg. On 7 October 1986 the respondent launched an application in the Transvaal Provincial Division for an order striking the name of the appellant off the roll of attorneys and for ancillary relief. The application was eventually heard on 4 June 1987 by Weyers and De Klerk JJ who granted the application. Certain ancillary orders, which included an order to pay the costs of the application on an attorney and client scale, were also made. Leave to appeal to this Court was subsequently granted by the Court a quo.

Prior to the launching of the application the Council of the respondent held an inquiry on 18 July 1986 at

Pretoria in order to investigate the manner in which the appellant had conducted his practice. In the course of the inquiry the appellant made certain admissions with regard to the theft of trust monies during 1984 and 1986. These admissions formed the basis of the respondent's application, and the allegations set forth in the respondent's founding affidavit in relation to such thefts were in turn admitted by the appellant in his answering affidavit. I shall later return to the factual background to these thefts and the circumstances in which they were committed.

On 9 March 1987 the respondent also filed a supplementary affidavit placing additional information before the Court regarding the appellant's failure to keep proper books of account. In support of its contentions in this connection the respondent relied upon the findings and conclusions set forth in the report of a firm of auditors appointed by the respondent to inspect the records and books of account of the appellant. The auditors came to the

conclusion that the appellant had failed to comply with the provisions of section 78(1) and (4) of the Attorneys Act, 53 of 1979 (the Act) as well as a number of Rules of the respondent.

In his answering affidavit to the respondent's supplementary affidavit the appellant conceded that his books of account had not been kept up to date or properly balanced. The appellant further admitted that there were certain trust accounts which were recorded as being in debit, but he explained that these debit balances were due to the fact that credits had been posted to the wrong accounts.

In view of the appellant's admission that he had stolen trust monies on a number of occasions during 1984 and again in 1986, it is unnecessary to deal with the irregularities relating to the appellant's books of account. The Court a quo adopted a similar approach and concluded that the matter could be resolved by considering only the thefts of trust monies.

The appellant conceded in the course of the inquiry... that his conduct in stealing the monies in question had been "grossly unprofessional and very dishonourable"; but he submitted that he was nevertheless a fit and proper person to practise as an attorney. The Court a quo, however, came to the conclusion that the appellant could not be regarded as a fit and proper person to perform the functions of an attorney and accordingly struck his name off the roll.

Section 22(1)(d) of the Act provides that an attorney may 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."

It was pointed out in A v Law Society of the Cape of Good Hope 1989(1) SA 849(A), at 851 A-F, that there are two considerations in these matters: whether the attorney concerned is fit to practise and, if not, whether he should be struck off or suspended. Both these considerations

involve the exercise of a discretion. In Law Society of the Cape of Good Hope v C 1986(1) SA 616(A), at 637 D-G, the circumstances in which the exercise of such discretion will be interfered with on appeal are set out in the following terms:

"This Court is therefore not entitled to interfere because in its opinion it would have come to a different conclusion. If it did so it would be substituting its discretion for that of the Court a quo. In Ex parte Neethling and Others 1951 (4) SA 331 (A) at 335 GREENBERG JA dealt with the question of an Appeal Court's power to overrule a lower court's decision where the decision has been on a matter within the discretion of the lower court. It follows from what is there stated that the question before this Court is, to quote GREENBERG JA:

'Can it be said in the present case that the Court a quo has exercised its discretion capriciously or upon a wrong principle, that it has not brought its unbiased judgment to bear on the question or has not acted for substantial reasons?'"

Mr Skweyiya, who appeared for the appellant, fairly conceded that there were no grounds for attacking the first finding of the Court a quo, namely that the appellant was not

a fit and proper person to continue to practise as an attorney. In my view there is nothing to show that the Court a quo did not exercise a proper discretion in reaching that conclusion.

The ambit of the appeal was therefore limited to the second stage of the inquiry, namely whether the Court a quo misdirected itself in any respect in deciding to strike the appellant's name off the roll. Counsel for the appellant referred to a number of factors which, in his submission, the Court a quo did not sufficiently take into account. Before considering those submissions I shall first set out the appellant's version of the relevant facts and the circumstances surrounding his misappropriation of trust monies.

It appears from the record of the proceedings at the inquiry that a certain Mr Charles Mabitsela had been a neighbour and client of the appellant. When he died his widow asked the appellant to administer his estate and the

appellant accepted the appointment. Pension monies belonging to the estate were paid to the appellant from time to time and he would advise the widow and pay the money into his trust account for the credit of the estate. The appellant also made occasional payments from the estate to the widow. During 1984 the appellant stole funds from the estate to pay the fees of counsel in matters unrelated to the estate. The appellant admitted that the following five unauthorised payments totalling R23 024 were made from the estate:

3 May 1984	6 500
12 June 1984	3 574
8 October 1984	4 950
11 October 1984	4 000
15 October 1984	<u>4 000</u>
	<u>R23 024</u>

During 1986 the widow of the late Mabitsela moved to Pretoria and appointed a firm of attorneys in Pretoria,

Messrs Friedland, Hart and Partners, to take over the administration of the estate of her late husband. The Pretoria attorneys asked the appellant to account to them and to pay over the funds of the estate. At that stage they amounted to R27 281. The appellant thereupon drew a trust cheque for this amount in favour of the Pretoria attorneys, but it was dishonoured by the bank on presentation. This was because there were insufficient funds in the appellant's trust account at the bank. The appellant provided the shortfall of some R8 000 from his own funds and the cheque was then met. The effect of this payment was that the appellant's trust account was denuded of all money, including trust money belonging to other clients of the appellant.

In the course of the inquiry the appellant told the Council of the respondent how it came about that there was this shortfall in his trust account. He explained that during the period January to June 1986 he had been acting almost exclusively for the South African Council of Churches

(SACC). He appeared for SACC in numerous court cases in the Northern Transvaal, but it would only pay him when a matter was finally disposed of in court. The appellant complained that this arrangement landed him in serious financial trouble and left him with almost no income during the first six months of 1986.

Counsel for the appellant submitted that the first aspect which the Court a quo failed to consider was the absence of any intention on the part of the appellant to defraud the widow of the late Mabitsela. Counsel referred to the fact that the appellant used to tell the widow whenever money was being paid into the account of the estate and that he kept her fully informed at all times about the financial position of the estate. The truth of the matter, however, is that the appellant did not disclose the full picture to the widow. He conceded at the inquiry that he never told the widow of his unauthorised withdrawal of substantial sums of money from the estate in 1984 for

purposes unrelated to the estate.

Mr Skweyiya further submitted that the appellant committed these thefts of trust money in order to keep his practice running at a time when he was placed in an embarrassing financial position through no fault of his own. This aspect was also raised in the Court a quo and considered by that Court. The fact that SACC did not pay the appellant his fees during the first half of 1986 might have been a reason why there was a shortfall in the appellant's trust account and why the appellant was unable to pay the sum of R27 281 to Friedland, Hart and Partners in 1986, but such conduct of SACC could never have caused the appellant any financial difficulties in 1984 since he started to act for SACC only in 1986. In the course of the inquiry the appellant also referred to his relationship with SACC which led to his financial problems in 1986, and he then went on to say -

"but we never had any financial problems until this particular period."

It is the appellant's version that the money which he stole from the estate in 1984 was used mainly to pay counsel's fees in other unrelated matters, but the appellant never explained why he had to resort to theft of trust monies in 1984 to pay counsel. There is, in any event, no evidence to suggest that there were extraneous circumstances in 1984 which prevented the appellant from running his practice in a normal fashion.

A further aspect which was raised by Mr. Skweyiya was that the appellant had tried without success to arrange overdraft facilities at the bank when he ran into financial difficulties. According to the appellant the bank refused to assist him in this regard because his house was situated in a Homeland and could therefore not be mortgaged. It does not appear whether the appellant investigated alternative means of obtaining bridging finance. The fact that an attorney may experience such personal problems can, of

course, never justify the misappropriation of trust monies.

The lack of overdraft facilities was probably not a contributory factor when the appellant stole the R23 000 from the estate in 1984, because on the appellant's own version he did not experience any financial problems before 1986. The appellant said at the inquiry that the 1984 thefts were committed in order to pay counsel's fees. He maintained that he was not aware that he could have approached the Bar Council to arrange for an extension of time, thus avoiding a blacklisting. The difficulty, however, is that the appellant never explained why he found himself in a position where he was not able to pay counsel's fees in 1984.

It was further submitted on behalf of the appellant that he was very frank about the thefts and that he made a full disclosure to the Council of the respondent. This is true, but as was pointed out by Mr. Ginsburg, who appeared for the respondent, the appellant only came out with the full story after he had been exposed.

In my judgment the appellant did not succeed in any way in showing that the Court a quo misdirected itself in any respect when it decided to strike the appellant's name off the roll. The appellant committed a series of thefts involving substantial amounts of trust monies over a period of time, and in my opinion the Court a quo was fully justified in ordering the removal of the appellant's name from the roll of attorneys.

In the heads of argument which were filed on behalf of the appellant it was also submitted that there were no special features justifying an award of attorney and client costs. However, the appellant in his answering affidavit gave an undertaking to pay such costs, whatever the outcome of the application. That undertaking, I consider, was not intended to include the further costs of an appeal.

The appeal is accordingly dismissed with costs. appeal

F H GROSSKOPF JA

HOEXTER JA)

NESTADT JA)

KUMLEBEN JA)

FRIEDMAN AJA)

Concur.