THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 517/18

In the matter between:

THE PRETORIA SOCIETY OF ADVOCATES **APPELLANT**

and

MARGARET VAN ZYL **RESPONDENT**

Neutral citation: *Pretoria Society of Advocates v Van Zyl* (517/18) [2019] ZASCA 13 (14 March 2019)

Coram Ponnan, Majiedt, Wallis, Swain and Schippers JJA

Heard: 25 February 2019

Delivered: 14 March 2019

Summary: Removal of name from roll of advocates – serious misconduct – theft of monies of colleagues – perjury in answering affidavit – forging and uttering of bank statements attached to answering affidavit – interference on appeal warranted in respect of sanction imposed by high court – struck from roll of advocates.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Tlhapi and Maumela JJ sitting as court of first instance):

1 The appeal is upheld with costs, on the scale as between attorney and client.
2 The order of the high court is set aside and replaced with the following order:
'(a) The respondent's name is removed from the roll of advocates.
(b) The respondent is ordered to pay the costs of the application on the scale as between attorney and client.'

JUDGMENT

Majiedt JA (Ponnan, Wallis, Swain and Schippers JJA concurring):

[1] This appeal concerns the appropriateness of the sanction imposed upon an advocate who, in her answering affidavit, admitted that she committed theft, perjury and the forgery and uttering of bank statements, in an attempt to mislead a court in an application to have her name removed from the roll of advocates. On the application of the appellant, the Pretoria Society of Advocates, the Gauteng Division, Pretoria (Tlhapi and Maumela JJ, sitting as court of first instance) (the high court), ordered that the respondent, Ms Margaret van Zyl, be suspended from practising as an advocate for a period of 18 months from the date of its order and to pay costs. The high court refused leave to appeal and the appeal by the appellant against that order is before us with the leave of this court.

[2] The facts were largely common cause and can be summarised as follows. The respondent's misconduct arose from events while she was practising at the High Court Chambers in Pretoria. She occupied chambers on the second floor and was a member of the appellant. Most of the advocates practising on that floor voluntarily joined a floor fund established to pay certain monthly allowances to staff and to pay for social

functions and other expenses. The respondent, together with Mr M D du Preez SC, administered the floor fund (conventionally, it seems, this task was allocated to a silk and a junior on the floor). This entailed, amongst others, operating the floor fund's bank account and reporting regularly to the members in respect of the administration and finances. The respondent performed this task with Mr du Preez from around October 2009 until August 2011 when she moved out of High Court Chambers.

[3] Self-evidently, the respondent was required to work closely with Mr du Preez in executing their tasks in respect of the floor fund. Diligent management of the finances, which included proper accounting at regular intervals, was required. To this end a system was developed between them in respect of joint authorisations and joint decisions when it came to expenditure and concomitant withdrawals from the bank account. Absent prior discussions and joint decisions, instances of expenditure and withdrawals had to be communicated to each other afterwards. Meticulous record keeping was necessary in respect of invoices, receipts, cheques, vouchers and the like. Files were kept for the floor fund in respect of the administration and finances.

[4] At that time, the floor fund had a savings account with Absa Bank. Initially the bank card was kept in Mr du Preez's office, but both he and the respondent used it to make purchases or withdrawals from time to time. At some stage the bank card was placed in the respondent's possession. Members made monthly payments of R100. When it became necessary to incur extraordinary expenses, such as the purchase of new equipment, additional contributions were made.

[5] In the course of 2010 a need arose to purchase new kitchen equipment. Members were required to make a once-off contribution of R300 each and 20 of them did so between October and December 2010. It was agreed between the respondent and Mr du Preez that the purchases would be made by the respondent. In order to obviate the danger of her keeping cash in her possession, it was agreed that the respondent would pay these monies into her personal credit card account. She assured Mr du Preez that the bank account was in credit at that time.

[6] Towards the end of 2010 it became necessary to have a fridge door repaired. Despite repeated requests by Mr du Preez for the bank card to be made available to

him to pay for this, the respondent failed to do so. When the respondent left and moved to another building in August 2011, she had still not handed over the card. After her departure Mr du Preez arranged with Absa Bank during September 2011 to cancel that card and to issue a new one. At the beginning of 2011 Mr du Preez had requested the respondent to hand to him the floor fund files in order for him to prepare a report to members about the status of the floor fund. She was also asked to report orally to him. The respondent left in August 2011 having failed to hand over the floor fund files or to give the oral report.

[7] During September 2011 the respondent was requested to transfer the funds for the kitchen equipment into the floor fund's bank account. Mr du Preez explained to her that the bank card, together with her authorisation to operate the account, had been cancelled. Upon perusing the fund account's bank statements for the period June 2011 to August 2011, which he had obtained from the bank when cancelling the former bank card, Mr du Preez discovered that an amount of R4 850 had been withdrawn from it. The respondent explained to him that she had withdrawn these amounts for the kitchen equipment purchases. She said that she was unable to withdraw the money from her credit card account, since that account was blocked by her bank for want of compliance with certain FICA[1] requirements. She undertook to refund the money as soon as her account was unblocked (for convenience, I adopt further the reference to 'the Blue Bean account', as the respondent's credit card account has been described throughout in the papers).

[8] Upon perusal of further bank statements for the extended period of October 2010 to 12 September 2011, Mr du Preez discovered that two further amounts of R1 000 each had been withdrawn in January 2011 and February 2011. A total of R6 850 had thus been withdrawn between January 2011 and August 2011. It also appeared that the funds contributed for the kitchen equipment had not been paid into the floor fund account.

[9] The respondent failed to honour appointments for meetings with Mr du Preez in September 2011 and, as stated, failed to furnish the floor fund files and the bank

[1] The Financial Intelligence Centre Act 38 of 2001.

card to Mr du Preez. The floor fund files were eventually delivered to Mr du Preez on 20 September 2011, whereupon he discovered that there was a shortfall of R4 739.79 in respect of the floor fund account. There was a note on the file that an amount of R6 105 had been paid into the Blue Bean account. No invoices, receipts or any other proof of the funds having been used for a legitimate purpose accompanied the files. There was a note on the file that an amount of R6 105 had been paid into the Blue Bean account. No proof of purchase of any kitchen equipment could be traced in the file. A total of R11 144.79 was either unaccounted for or unexplained as at 21 September 2011.[2] The respondent replied to Mr du Preez's request for an explanation in an email dated 3 October 2011. The amount of R4 739.79, which the respondent explained was for the new kitchen equipment, was repaid into the floor fund's account on that date. On the respondent's version, this was done after she had returned the equipment to the various stores from which it had been purchased. The respondent further alleged that she had paid the amount of R6 405 into the Blue Bean account.

[10] The members of the floor fund received a report from Mr du Preez on 3 October 2011. Pursuant thereto, three senior floor members, Messrs Bosman SC, Engelbrecht SC and Raath SC, held a meeting with the respondent on 5 October 2011. A follow up meeting was scheduled for 7 October 2011, where the respondent, as she had undertaken to do, was to provide them with statements of her Blue Bean account and invoices and receipts in respect of the kitchen equipment. None of these were, however, forthcoming at the meeting of 7 October 2011. After these two meetings, Mr Raath sent the respondent several text messages on her mobile phone, imploring her to have the matter resolved without further delay. The responses were unsatisfactory and, eventually, the respondent failed to respond to the messages. Following upon the unsuccessful attempts by the three silks to resolve the matter, first Mr du Preez and later Mr Botes SC, referred a complaint to the appellant. The application to have the respondent's name removed from the roll of advocates followed.

[11] In her answering affidavit the respondent left the above exposition of the sequence of events largely uncontested. She alleged that, after the problems with her

[2] The amount of R11 144.79 is made up of the shortfall of R4 739.79 in the floor fund account and an amount of R6 405 collected from members. One member's cheque of R300 was never deposited and thus expired.

Blue Bean account had been resolved, she had instructed her bank to close that account and to transfer the full closing balance of R8 203.90 into her attorney's trust account. On her instructions her attorney paid the amount of R7 105 into the trust account of the appellant's attorney. That amount represented R6 105 as repayment of the capital and R1 000 as interest thereon. She alluded to the numerous difficulties she had experienced in her personal life at that time and proffered an apology to her colleagues for her conduct.

[12] A few excerpts from the respondent's answering affidavit deserve mention. First, she commented on her conduct as follows:

'Although I offer my humblest apology, not only for my conduct, but also for the manner in which it was perceived by my colleagues, I wish to state that at no time I had any intention of wrongdoing herein. *There was no dishonesty on my part*.' (My emphasis). (Vol 1, 105, para 29.2).

This statement must be understood against the backdrop of her explanation that the only reason why she had made withdrawals from the floor fund's account, was because her Blue Bean account had been blocked. According to her she had every intention to refund the money once her account was unblocked. She stated that 'the funds for the new kitchen equipment were indeed retained in the Blue Bean account'. In support of this allegation she attached a copy of a Blue Bean credit card statement dated 10 October 2011, which appeared to reflect a credit balance of R8 063.51.

[13] Second, in respect of the withdrawals made, the respondent said:

'I confirm having been in a position of trust to the members of the floor fund with regard to all funds of the floor fund. I admit certain withdrawals may have seemed conspicuous, however trust my explanation offered herein clarified any suspicions of misappropriation of such funds . . . *I humbly submit there was at no time any misappropriation of funds by myself as averred.* I have offered a detailed account of all monies referred to as well as all withdrawals made and trust my explanation herein clarified any uncertainty as to the use and/or withdrawal of any funds.' (My emphasis). (Vol 1, 108, paras 31.1 and 31.2).

I shall revert to these extracts presently.

[14] Dissatisfied with the incompleteness of the credit card statement attached to the answering affidavit, the appellant's attorneys requested full disclosure of all

transactions from October 2010 until April 2013. They also sought proof that the funds paid into the respondent's attorney's trust account (R7 105) had in fact emanated from a transfer from the respondent's Blue Bean account.

[15] On 14 March 2014 the hearing in the high court was postponed at the respondent's request. This was to enable her to explain the apparent discrepancy between the contents of the statement from her Blue Bean account produced by her at that hearing, and the allegation in her answering affidavit that the members' contributions for the kitchen equipment had been paid into that account.

[16] In a supplementary affidavit the respondent made the following admissions in a complete volte face from her innocent explanation in her answering affidavit:
(a) She did not pay the amount of R6 105 into the Blue Bean account, as was apparent from the bank statements put up by her on 14 March 2014. She acknowledged that she had misled the court in this regard and apologised for her conduct.
(b) The initial credit card statement in respect of her Blue Bean account, attached to her answering affidavit, was not correct. She had, in her words, 'manipulated' the entries in these statements, as well as the balance, available money and the entries under 'account summary'. Again, she proffered her apologies for her conduct, acknowledging that 'this conduct is not the conduct expected of an advocate of this Honourable Court' (Vol 2, 168, para 3.2). She explained that she had used the money to assist her mother. These admissions put paid to the earlier contentions in her answering affidavit that she had not acted dishonestly and that there had been no misappropriation of any funds.

[17] The high court found the respondent's conduct 'reprehensible', but declined to strike her name from the roll. The primary reasons for imposing an 18 month suspension, appear to be the fact that the respondent had shown remorse, had repaid the money and was a first offender.

[18] It is well established that in these types of matters, a three-stage inquiry is envisaged.[3] First, the court must determine whether the alleged offending conduct has been established on a balance of probabilities – this is a factual inquiry. Second, a determination must be made whether the person in question is a fit and proper person to continue practising. This entails, to some extent, a value judgment, but it is essentially an objective finding of fact.[4] And third, the court must decide whether in all the circumstances the particular person is to be removed from the roll or whether a suspension is adequate. In respect of the third question, the court exercises a discretion. Appellate interference with that discretion is limited to instances of a failure to bring an unbiased judgment to bear on the issue; failure to act for substantial reasons; or where the discretion has been exercised capriciously or upon a wrong principle or as a result of a material misdirection.[5]

[19] The high court did not set out in its judgment the offending conduct it found to have been established as a fact. It is necessary to recap the respondent's offending conduct. First, the respondent stole money from the floor fund – the shortfall of R4 739.79 and the unaccounted amount of R6 405 in respect of the contributions for the kitchen equipment. Both these amounts were repaid afterwards by the respondent. Second, she misled her colleagues, in particular Messrs du Preez, Bosman, Engelbrecht and Raath, on whether the money had in fact been paid into her Blue Bean account. Third, she perjured herself in her answering affidavit in a number of respects. And fourth, she committed forgery and uttering by altering the entries on her Blue Bean account bank statement, annexed to her answering affidavit. The reference in her papers to her having 'manipulated' the entries on the credit card statement, is a misnomer. This is a stark instance of forgery and uttering, no less.[6]

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[3] *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA); [2000] 2 All SA 310 (A) para 10; *Malan & another v The Law Society of the Northern Provinces* [2008] ZASCA 90; 2009 (1) SA 216 (SCA); [2009] 1 All SA 133 (SCA) para 4.
[4] *Kekana v Society of Advocates of SA* [1998] 3 All SA 577 (A) 1998 (4) SA 649 (SCA) at 654D-E.
[5] *Giddey NO v J C Barnard & Partners* 2007 (2) BCLR 125 CC; 2007 (5) SA 525 (CC) para 20; *Malan* fn 3, para 13.
[6] Forgery is the unlawful and intentional making of a false document to the actual or potential prejudice of another. Uttering is the bringing of the falsified document to the attention of others. See C R Snyman *Criminal Law* 6ed (2014) at 532-533.

[20] These are self-evidently instances of serious misconduct and include three criminal offences, theft, forgery and uttering and perjury. They involve acts of calculated dishonesty and are in my view indicative of a serious character defect, rather than a mere moral lapse. There are further aggravating features – the respondent made the damning admissions only when she was compelled to disclose the complete, unaltered Blue Bean account statement in order to explain the discrepancy between her ipse dixit in her answering affidavit and the annexures thereto (the bank statements). Further she made payments from her practice bank account in the amount of R7 000 into her Blue Bean account only after the application was launched in the high court. This must be viewed against the respondent's repeated assurances to Mr du Preez and other colleagues that the contributions had been paid into the Blue Bean account. This lie was perpetuated in her answering affidavit under the guise that she was unable to access these funds due to her account having been blocked. And her initial protestations of innocence that there had been no dishonesty on her part or a misappropriation of funds, implied that her colleagues were liars.

[21] There are several material misdirections in the judgment of the high court. They relate not only to its factual findings, but also to its erroneous application of the law to the facts. First, the high court found that the respondent's conduct 'could amount to perjury'. This is a clear case of the crime of perjury and it was established, not only through the objective fact of the bank statements, but also through the respondent's own admissions. Second, the finding that the respondent did not persist with her deception until the end, is unsustainable on the facts. When the respondent found herself compelled to disclose the complete bank statements, after the hearing of 14 March 2014, she must have known that the game was up. But for this demand from the appellant's attorneys, she might well have succeeded with her deception and concealment.

[22] Third, it is difficult to understand how the respondent's repayment of the money could qualify as remorse, as the high court found. Even if we accept the respondent's version that she had bought and returned the kitchen equipment to the various stores, she knew that the money had to be paid into the floor fund account. This repayment was only made after she had deposed to her answering affidavit in April 2013. At more

or less the same time she had altered the bank statements to conceal the fact the money had never been paid into her Blue Bean account, as she had maintained all along. This conduct is not indicative of true remorse as was described in *Matyityi,*[7] 'a gnawing pain of conscience for the plight of another . . . [t]hus genuine contrition can only come from an appreciation and acknowledgment of one's error'.

[23] Fourth, the high court did not make a finding as to whether or not the respondent is a fit and proper person to continue practising as an advocate. Although the high court made mention of the three-stage inquiry, it failed to deal with this second, important question. It merely found the conduct to be 'reprehensible' before embarking upon a consideration of the appropriate sanction. Section 7(1)(*d*) of the Admission of Advocates Act 74 of 1964 provides that a court may either suspend a person from practice as an advocate or order the striking off of his or her name from the roll of advocates 'if the court is satisfied that he [or she] is not a fit and proper person to continue to practise as an advocate'. In *Malan* this court said:

'. . . 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.'[8]

These remarks apply equally to an advocate.

[24] And, lastly, the outcome itself is a misdirection. In arriving at the conclusion that suspension instead of striking off was the appropriate sanction, the high court made a decision that in my view no reasonable court could make on the proved facts. The inference is compelling that the high court misdirected the inquiry or acted upon wrong principles.[9]

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[7] *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA) [2010] 2 All SA 424 (SCA) para 13.
[8] *Malan* fn *3,* para 8.
[9] *General Council of the Bar of South Africa v Geach & others, Pillay & others v Pretoria Society of Advocates & another, Bezuidenhout v Pretoria Society of Advocates* [2012] ZASCA 175*;* 2013 (2) SA 52 (SCA); [2013] 1 All SA 393 (SCA).

[25] In view of these misdirections interference on appeal is warranted. Considering the serious acts of dishonesty on the part of the respondent, I am of the view that she is not a fit and proper person to continue practising as an advocate. As stated, this inquiry entails a value judgment based on the established facts. The respondent's conduct must be assessed against the conduct expected of an advocate. The proper administration of justice relies heavily on the ipse dixit of advocates and attorneys. While a legal practitioner owes a duty to represent his or her client fearlessly and vigorously, there is a concomitant, equally important, duty as an officer of the court to serve the interests of justice by acting honestly at all times.[10]

[26] The respondent's perjury in the answering affidavit must count heavily against her. An advocate who lies under oath in striking off proceedings must know that such dishonesty can be held against him or her in deciding whether he or she is a fit and proper person to continue to practise as an advocate.[11] The appellant has strict rules to ensure that its members do not deceive a court. The theft of monies of colleagues and the forging and uttering of the bank statements are just as serious. As I have said, this conduct is indicative of a serious character defect rather than a mere moral lapse. This was not the impulsive telling of a lie, but protracted chicanery. The respondent's deceit, concealment and dishonesty continued over a long time. And it was carefully planned to hoodwink her senior colleagues and the court. In the premises, the respondent is not a fit and proper person to continue practising as an advocate.

[27] What remains is the question of an appropriate sanction. The starting point must be that a court is not imposing a penalty – the prime consideration is the protection of the public. A close reading of the judgment of the high court leaves one with the impression that it failed to draw this important distinction. The high court appeared to have been swayed by the respondent's 'remorse', the fact that she was a first offender and that she had repaid the money. This is reminiscent of mitigating circumstances for sentencing purposes in a criminal trial. Nowhere did the high court mention and consider the interests of justice, the public and the advocates' profession.

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[10] *Kekana* fn 4, at 655H-J.
[11] *Olivier v Die Kaapse Balieraad* 1972 (3) SA 485 (A) at 500H; *Kekana* fn 4, at 655G.

[28] The factors to be considered are the nature of the offending conduct, the extent to which it reflects upon the person's character or shows him or her to be unworthy of remaining in the ranks of the profession, the likelihood or otherwise of the repetition of such conduct and the need to protect the public.[12] As stated, the respondent's grave acts of dishonesty are indicative of a serious character defect. In order to avoid striking off, the respondent had to satisfy the high court that she would not in future steal, commit perjury or the forging and uttering of documents. There is nothing in the record to persuade me that this is the case. The extent and premeditation of the respondent's dishonesty, deceit and concealment drive me to the inescapable conclusion that striking off is inevitable. As this court said in *Malan,* '[i]t 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'.[13] Any order of suspension must bear the condition that the cause of unfitness is removed during that period.[14]

[29] In conclusion: the present set of facts represents an extremely serious case of misconduct. We would be remiss in letting the respondent loose on the unsuspecting public. Her professional integrity has been completely destroyed and she should not be permitted to continue in her practice. Removing her name from the roll of advocates would ensure that, upon seeking readmission, she would have to convince a court that she has overcome the serious character defect of dishonesty.

[30] As far as the costs are concerned, it was conceded on behalf of the respondent that costs, both in this court and in the high court, should be on the scale as between attorney and client. That concession was well made – it is settled that this is the usual order to be made.

[31] One last disconcerting aspect requires mention. There was a delay of more than two years in delivering the main judgment. Sixteen months later the judgment refusing the application for leave to appeal followed. An application to have the name of a practitioner removed from the roll involves the question of whether the practitioner

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[12] *Malan* fn 3, para 6.
[13] *Malan* fn 3, para 8.
[14] *A v Law Society of the Cape of Good Hope* 1989 (1) SA 849 (A) at 852E-G.

should continue practising and implicates the public interest. For these reasons both the practitioner concerned and the public can rightly expect courts to deal with such a matter expeditiously. Regrettably, in the present instance the high court failed to do so. The facts were uncomplicated and became largely common cause and the legal principles are well established. It does not serve the interests of justice to permit delays of this length in these types of cases.

[32] The following order issues:

1 The appeal is upheld with costs, on the scale as between attorney and client.
2 The order of the high court is set aside and replaced with the following order:
‘(a) The respondent’s name is removed from the roll of advocates.
(b) The respondent is ordered to pay the costs of the application on the scale as between attorney and client.’

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S A Majiedt
Judge of Appeal

APPEARANCES:

For Appellant:	A T Lamey with C van Schalkwyk
Instructed by:	Bernard van der Hoven Attorneys, Brooklyn
	Rosendorff Reitz Barry, Bloemfontein
For Respondent:	C A da Silva SC with M Pienaar
Instructed by:	Pretorius & Cilliers, Pretoria
	Honey Attorneys, Bloemfontein