IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION. MAIN SEAT

CASE NUMBER 2734/2018

(1)	**REPORTABLE: YES**
(2)	**OF INTEREST TO OTHER JUDGES: YES**
(3)	**REVISED.**
03 August 2019 **DATE**	**SIGNATURE**

THE LAW SOCIETY OF THE NORTHERN PROVINCES APPLICANT

And

DANIEL THEMBA MABUNDA 1ST RESPONDENT
MABUNDA (D&M) INCORPORATED ATTORNEYS 2ND RESPONDENT

JUDGMENT

LEGODI JP

[1] An attorney is a member of a learned respected and honourable profession and by entering it, he pledges himself with total and unquestionable integrity to society at large, to the courts and to the profession. The very highest standard conduct, repute and good faith are consistent with membership of the profession

which can indeed only function effectively if it inspires the conditional confidence and trust of the public. The image and standing of the profession are judged by the conduct and reputation of all its members and to maintain this confidence and trust, all members of the profession must exhibit the qualities set out above at all times.

[2] The law exacts from an attorney *uberrima fides* –that is, the highest possible degree of good faith in dealing with his client, which implies that at all times his submissions and representations to his client must be accurate, honest and frank. In pecuniary matters the attorney must be punctual and diligent in dealing with matters entrusted to him and must account promptly.

[3] The present application has been prompted by several complaints made by the former clients of Mr Mabunda. In the course of investigating these complaints it was also discovered that proper books of account and regularly accounting to clients were not been adhered to. I deal later in this judgment with the nature of the complaints lodged by the clients of Mr Mabunda.

[4] It suffices however to mention that Mr Mabunda in his response to some of the issues raised with him as uncovered during investigations of his practice, admitted that he delayed the payments of trust funds to his clients. He made these admissions after some of his clients had complaint against him. He also admitted that his trust account had deficit, that there was deficiency in his bookkeeping system, that his *bona fides* and vigilance were not good enough and meticulous in compliance with every rule required to be complied with. He also admitted that his divided attention was the result of some of the shortcomings regarding his practice and that he made mistakes in his bookkeeping records.

[5] All of the admissions must be seen in the context of the applicable rules and also in the context of his lack of diligent. He shall not retain money belonging to his client longer than is absolutely necessary and shall account to his client in a proper and diligent manner any funds recovered by him on behalf of client.

[6] The principle and noble words articulated in paragraphs [1] to [3] above were restated and emphasised in the present application for the striking off from roll of

attorneys of Mr Daniel Themba Mabunda who was admitted as such on 17 August 2000. The principle as repeated in the preceding paragraphs above are articulated in paragraphs 8.2, 8.7 and 8.8 of the founding affidavit deposed to on 15 September 2018 by the President of the Law Society of the Northern Provinces, Mr Sibusiso William Mavela Gule.

[7] Mr Mabunda is not for the first time blamed for unprofessional conduct. On 19 March 2008 he was suspended on certain conditions from practising as an attorney. I deal later towards the end of this judgment with Mr Mabunda's transgressions in relation thereto. The rule that withdrawals from a firm's trust banking account shall be made only for trust creditors or as transfers to the firm's business banking account is very important and is intended to protect the public and the image of the legal profession. Therefore, the rule that '*no transfer from trust banking account to business banking account is made in respect of any disbursement (including counsel fees or fees of the firm <u>unless justified'</u>*, is fundamental'[1]. I deal later in detail with the relevance of this rule.

[8] Trust money shall in no circumstances be deposited in or credited straight to a business banking account[2]. An attorney must ensure that when making a transfer from its trust banking account to its business banking account, the amount transferred is identifiable with, and does not exceed the amount due to it, the trust creditor from whose account the transfer is made is identifiable, and the balance of any amount due to it and remaining in its trust banking account is capable of identification with corresponding entries appearing in its trust ledger[3].

[9] A firm shall, unless otherwise instructed, pay any amount due to a client within a reasonable time[4]. The nature of the contravention with regards to the Rules referred to above will appear clearer when i deal with specific complains laid against Mr Mabunda and his attempted efforts to justify himself.

[1] Rule 35. 13, 14.1 and 35, 13,14.2
[2] Rule 35.10
[3] Rule 35.10.2 – 35. 10, 2.3
[4] Rule 35.12

[10] At the time of the institution of the present proceedings the Attorneys Act 53 of 1979 was still applicable. 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 fit and proper person to continue to practice as an attorney[5].

[11] The section envisages three-stage inquiry– 'first, the court must decide whether the alleged offending conduct has been established on a preponderance of probability which is 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 continue to practice. This involves a weighing up of the conduct complained of against the conduct expected of the attorney and to this extent, is a value judgment. That, 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[6].

[12] Provisions was thus made for either the removal of an attorney which is not 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 practice as an attorney in the ordinary course of events, it would not remove him from the roll, but order an appropriate suspension[7].

[13] Section 22(1)(d) and authorities with reference thereto are still applicable because in terms of section 116(1) of the Legal Practice Act No 28 of 2014 in proceedings in respect of the suspension of any person from practice as an advocate, attorney, conveyancer or notary, in respect of the removal of the name of any person from the roll of advocates, attorneys, conveyancers, notaries which have been instituted in terms of any law repealed by this Act, and which have not been

[5] Section 22(1)(d) of the Attorney Act
[6] Botha v Law Society Northern Provinces 2008 2 ASCA /06; 2009(1) SA 227 SCA para 2; see also Law Society v Sonntag [2011] ZASCA 204 (25 November 2011) at para [2]
[7] Malan & Another v Law Society Northern Provinces [2008] ZASCA 90; 2009 (1) SA 216 (SCA) at para 8; see also SOONTAG *supra* [2] at para

concluded at the date referred to in section 120(4), must be continued and concluded as if that law had not been repealed.

[14] The date referred to in section 120(4) of the practice is 1 November 2018. The present proceedings were instituted in this court on 26 September 2018 and therefore the present proceedings should be adhered to and dealt with as if the Attorneys Act has not been repealed and thus the applicability of section 22 to the present proceedings. I now turn to deal with the complaints laid against Mr Mabunda.

[15] The investigation on behalf of the Law Society was conducted by Mr Ashwin Reddy, a chartered account and auditor. Having executed his mandate, he submitted a report on 17 July 2018 which report contained worrying conduct on the part of Mr Mabunda.

[16] On 10 May 2018 Mr Reddy met with Mr Mabunda in the presence of the latter's bookkeeper. His bookkeeping records could not be produced as they were allegedly with the firm's bookkeeper and that they were updated up to 31 May 2018. That of course could not have been correct for books to have been updated to 31 May 2018 as on 10 May 2018.

[17] As books for record were not available, it was agreed that Mr Reddy will provide a list of records needed for his initial investigation. On 16 May 2018 Mr Reddy addressed a letter to Mr Mabunda wherein the required information and or records were sought. When there was no response to the letter, on 4 June 2018 Mr Mabunda was contacted and enquired about the requested bookkeeping and accounting records. Mr Mabunda later that day responded to Mr Reddy.

[18] Mr Mabunda only then reported to have received the letter of 16 May 2018 and then alleged that he was still waiting for his books of records from the auditors. Failure to have responded to a letter of 16 May 2026 coming from the Law Society after the meeting of 10 May 2018 is not commensurate with the conduct of an attorney who has the respect for his professional body. He was required to respond promptly. If Mr Mabunda had problems in accessing his accounting books since 10

May 2018, he was expected to promptly inform Mr Reddy. Prudent and innocent attorney would have done so.

[19] On 4 June 2018 Mr Mabunda undertook to contact his bookkeeper or auditors for the required bookkeeping records. He however failed to provide such accounting books of record. On 25 June 2018 Mr Reddy wrote another letter to Mr Mabunda and recorded his failure to provide him with the relevant information and records and demanded compliance by 29 June 2018.

[20] On 29 June 2018 Mr Mabunda contacted and asked for another meeting instead. This was done without providing the required records. On 5 July 2018 another meeting took place. The meeting was arranged and took place on condition that Mr Mabunda would make the information requested available during the meeting. During that meeting, Mr Mabunda admitted that he had delayed the payment of trust funds to his clients and alleged that all complaints had since been attended to and accounted for. Almost like the delay to provide information and books of records was as a result of the attempts to do damage control with clients.

[22] The conduct as displayed by Mr Mabunda is not an isolated occurrence. Very often and almost always when an attorney found himself or herself having misappropriated trust funds, would in the first place become uncooperative as Mr Mabunda did. Delay in paying trust creditors in itself is impeachable conduct contrary to the rules of practice of an attorney. The delay in addition, has the potential for temptation to unrestrained attorneys. But that in itself raises a red light as it has happened in the present proceedings as it would appear clearer later in this judgment.

[23] It is common occurrence for errant attorneys that when investigated, they would rush to their clients almost seeking to silence them by paying them out of whatever source and then request them to withdraw the complaint. Unfortunately, by that time the horse would have already bolted. Trust money would have been misappropriated. A conduct that cannot be swept off the carpet by rushing to client, asking for apology and paying what was supposed to have been paid long ago.

[24] Insofar as Mr Mabunda might have seen his conduct of seeking to dispose of the complaints with clients in the process of investigation by its professional body, as mitigating, he is wrong. It is actually aggravating in itself. It amounts to defeating the end of justice. This is not only unprofessional but it also amounts to criminal unlawful conduct the same way as misappropriation of trust funds does. It therefore cannot be minimised by paying what was long due to trust creditors.

[25] During the meeting of 5 July 2018, Mr Mabunda was asked if he was admitting that all the complaints against him for delaying the payment of trust funds, and that in all matters monies due to the complainants were not available in his trust banking account. There and then he should have had an answer, more so if he was claiming that he had paid all the complainants what was due to them.

[26] Instead, Mr Mabunda informed Mr Reddy that he wished to peruse his accounting records before submitting them to Mr Reddy. There were records that had long been asked for by Mr Reddy and which Mr Mabunda could have perused them for the purpose of meeting of 5 July 2018 which he had himself requested. He also indicated that he wanted to make written representations concerning the complaints. Therefore, suggesting that he was fully aware of the state of affairs and what had actually happened to the trust monies of those clients who complained. He was just not being candid to Mr Reddy and his professional body, a conduct that is unprofessional and dishonourable.

[27] The meeting of 5 July 2018 had to be adjourned and Mr Mabunda asked for more time to deliver his accounting records to Mr Reddy on or before 13 July 2018. On 12 July 2018 he sent an email to Mr Reddy alleging that Ms Kaserera, a predecessor accountant and Auditor to Mr Reddy in the investigation of Ms Mabunda's practice, had attended at his firm and that Mr Reddy's investigation or discussion with him was "a recap" of Ms Kaserera's discussion and that the updated accounting records, trust bank statements and information concerning the complaints were provided to Ms Kaserera.

[28] This was clearly an afterthought which in my view, was driven by the desire to be uncooperative and distractive. Firstly, he said the books were with auditors and

or bookkeeper one of whom was present in the first meeting of 10 May 2018. Secondly, at no stage before 12 July 2018 did he alleged that the information and records requested were with Ms Kaserera. Thirdly, Ms Kaserera met with Mr Mabunda on 12 September 2017. Therefore, when Mr Reddy addressed a letter of 16 May 2018 to Mr Mabunda and asked for accounting records for the period ending 28 February 2018 it could not have been possible for Mr Mabunda to have provided Ms Kaserera who was there on 12 September 2017 with the accountant records for the period up until February 2018.

[29] In paragraph 11.30 of the founding affidavit deposed to on 15 September 2018 it is stated: "The first respondent's explanation contained in his letter dated 12 July 2018 was therefore patently false". I cannot agree more. And this displays a conduct that is difficult to correct as Mr Mabunda alleges that he is capable of being corrected. I deal later in this judgment with his assertion to this effect.

[30] It suffices for now to mention that it was this kind of conduct which made Mr Reddy to conclude that Mr Mabunda intentionally acted in an obstructive and uncooperative manner in order to avoid an inspection of his accounting records. Mr Reddy therefore correctly found that Mr Mabunda had sufficient time and opportunity to provide the Law Society with his accounting records which he persistently resisted to provide until he was so ordered: to do so by the court.

<u>Complaints by Mr P T Mhlanga and Ms Madumandaba</u>

[31] I elect to deal with these two complaints under the same heading because Mr Mabunda in his supplementary affidavit deposed to on 31 May 2019 *inter alia*, admitted:

'*I concede that Mhlanga's and Madumandaba's trust funds, which were <u>erroneously</u> transferred into my business account, were used for the purpose indicated by Mr Reddy and were not at all relevant times available in my business account to cover the trust debts.'* (My emphasis*).*

[32] A background to the statement is necessary: Mr Mhlanga was Mr Mabunda's client concerning a third party claim arising from a motor vehicle accident which happened on 13 January 2011. The claim was successful and on 18 March 2015 the Road Accident Fund pad R560 000.00 into the trust account of Mr Mabunda. Mr Mabunda however failed to account to client and to pay over the proceeds of the claim.

[33] Upon investigation by Mr Reddy the following was discovered: On 19 May 2015 an amount of R160 000.00 and R400 000.00 were transferred into Mr Mabunda's business account. On perusal of Mr Mabunda's business account which were provided only upon an order of court Mr Reddy discovered both amounts were posted to Mr Mabunda's fee income known as "1000/00 Fee Income". Therefore, there could not have been erroneous transfer of R400 000.00 trust funds into business account marked as a fee income. The mind and intention when two amounts from trust account in respect of Mr Mhlanga could not have been a mistake. It was intentional as it would appear hereunder.

[34] Clearly the transaction evidences a contravention of the provisions of Rule 35.13 and 14.1 of the Rules of the Attorney' Profession referred to earlier in paragraph [7] of this judgment. Closely considered, the conduct amount to nothing else than misappropriation. His earlier version that the amount of R400 000.00 remained in his business account until it was paid to Mr Mhlanga was obviously false.

[35] Here is the context: As on 31 May 2015 only an amount of R11 902.68 remained available in his business banking account and an amount of R400 000.00 paid into the business account was not yet paid to client. Upon closer perusal of the business bank statement / account it became clear what had happened to the money.

[36] On the very same day in which the amount of R400 000 was paid into the business account, an amount of R200 000.00 was paid at ABSA Bank for the benefit of Lourens Hattigh and another amount of R286 720.00 was paid at ABSA for the

benefit of Baliju/ Sheriff White River. This, in my view, amounted to theft of trust funds belonging to Mr Mhlanga.

[37] The complaint lodged by Ms Thule Madumandaba was of no difference as to how Mabunda dealt with the trust funds he received from the Road Accident Fund on behalf of Mr Mhlanga. Mr Mabunda was also instructed by Ms Madumandaba to lodge a third party claim against the Road Accident Fund. On 6 July 2015 the Fund paid into Mr Mabunda's trust account an amount of R325 513.60, Mr Mabunda then effected two transfers into his business account as follows: On 7 July 2015 an amount of R244 135.20 with the description Ibank Transfer – 406 880 9464 and on 13 July 2015 an amount of R81 378.40 also described as Ibank Transfer – 4068809464 was transferred into the business account of Mr Mabunda.

[38] The initial explanation for all of the above was that an amount of R81 378.40 related to his fees. With regard to the amount of R244 135.20 the allegation was that the intention was to pay the proceeds thereof to Ms Madumandoda which of course did not happen at that time. The allegation that the amount remained in his business account until it was paid to client, was also not true.

[39] Having transferred the two amounts from trust to business on 7 and 13 July 2015 respectively, as on 31 July 2015 the balance in his business account was R672.82 and the amount of R244 135.20 was not paid to client yet. Instead, it was discovered that some of the funds in the business account were dispensed as follows: 7 July 2015 an amount of R64 698.67 was paid to Haasbroek Boezaart and R50 000.00 to Mbombe Stokvel. It looks like transfer of the amount of R244 135.20 from Ms Madumandoda's trust ledger account on 7 July 2015 was meant to facilitate payment as indicated above. In any event, the amount of R244 135.50 was posted from trust account to business account as "1000/000 – Fee Income". The intention was clear, to misappropriate. The statement quoted earlier in paragraph [31] of this judgment seem to show lack of appreciation for the serious nature of this conduct.

[40] See the following statement by Mr Mabunda in context:

'*It is difficult to understand how the applicant and or Mr Reddy could (in view of Mr Reddy's latest findings after studying the business accounts and records), still allege in (para 2.2.2) that there was a rolling of trust funds to pay one creditor from the funds of other. It appears from his latest report that the relevant trust creditors were paid from the business funds in my business account. There was no waiting by one trust creditor for funds from another trust creditor before payment could be effected.'*

[41] The statement, '…*the relevant trust creditors were paid from business funds in my business account'*, misses the point. Firstly, it is improper conduct to transfer funds from trust account to business account with the sole purpose of paying the trust creditor concerned out of the business account. It boggles one's mind that an attorney will even think about dealing with trust funds in this fashion. Trust creditors are paid out of trust account. Mixing of trust funds with business funds is not allowed. Simple as that. Secondly, taking trust funds out of trust account into business account and then use the funds to pay other creditors unrelated to those funds, amounts to rolling of trust funds. The motive for doing so in the instant case should be apparent. It was to misappropriate those funds.

[42] Mr Mabunda further in paragraph 10 of his affidavit deposed to on 31 May 2018 says other things which are incomprehensible and further boggles one's mind. For example:

"10.1 It is nevertheless by humble submission that these shortages are mitigated by the fact that my practice was generating a substantial income, that I was at all relevant times financially strong enough to pay all the trust creditors fully, and, more importantly, that I did in fact do so. I had other funds and financial means (for example investments referred to by Mr Reddy, as well as substantial assets) and my practice turnover amounted to millions of Rand per year. This ensured cumulatively and the clients were never subjected to any real risk of not being paid. This corroborated by the fact that the clients were indeed paid long ago, and that I was in the position to make the payments without running into financial difficulties (which is practically impossible where new trust funds must be rolled to make such payments).

It looks like Mr Mabunda suggests that there is nothing wrong in rolling trust funds into business account, pay other business creditors out of those funds including the stokvels which were apparently his '*investments*' and then say he had '*substantial assets'*, is with respect, indicative of un-repented conduct that cannot be corrected by suspension.

[43] First, '*…I was at all relevant times financially strong enough to pay all the trust creditors fully, and more importantly, that I did in fact do so, I had other funds and financial means (for example investments referred to by Mr Reddy, as well as substantial assets) and my practice turnover amount to millions of Rand per year*", is not correct. On occasions as it appeared in the preceding paragraphs, he did not have strong financial means to pay his trust creditors out of business account let alone out of the trust account.

[44] Look at the statement this way: In paragraph 10 of the same affidavit, Mr Mabunda admitted that; 'funds were transferred into business account, were used for the purposes indicated by Mr Reddy <u>and were not at all relevant times available in business account to cover the trust debts'.</u> That is an admission of misappropriation amounting to theft and or dishonesty.

[45] To allege in paragraph 10.1 of his affidavit that '*at all relevant times he was financially strong enough to pay all the trust creditors fully'* and that he did in fact do so, is just not true. His other funds and financial means for example investments and alleged substantial assets, is not an excuse for his conduct to justify misappropriation of trust funds.

[46] For Mr Mabunda to see it as mitigating by alleging that '*the full payments were effected even before the institution of these proceedings, corroborates the absence of character flaws',* in my view displays a clear lack of appreciation of the serious nature of his conduct and he is also not honest with the court.

[47] I say so because he did not voluntarily and in time pay the complainants. Firstly, he started by being uncooperative and distractive when the investigation was launched. Secondly, in my view, he sought to silence the complainants by rushing to

them and paid them, late as it might have been. This he did, after he became aware that trouble was on his pursuit at a fast speed. What is stated in paragraph 10.1 of Mr Mabunda's affidavit cannot serve as mitigation for his conduct. Even if it was, it is far outweighed by aggravating factors. In the circumstances, removal is justified as he had ceased to be fit and proper person to remain on the roll of attorneys.

[48] Just before I conclude, it is also necessary to refer to the other two complaints lodged against Mr Mabunda. On 7 November 2016 Mr Pilson, an attorney by profession instructed Mr Mabunda to assist in the purchase of an immovable property in White River. An amount of R300 000.00 was paid into Mr Mabunda's trust account. When the transaction for the sale of that specific property did not fall through, Mr Mabunda failed, refused and or neglected to refund the amount of R300 000.00 to Mr Pilson.

[49] Mr Mabunda like the other two complaints alluded in the preceding paragraphs, transferred the said amount of trust money into his business account starting from 9 November 2016 and the last transaction being made on 7 December 2016. In his affidavit he seeks to give an explanation.

[50] Mr Mabunda in his answering affidavit deposed to on 2 October 2018 and titled "ULTIMATE SANCTION INAPPROPRIATE" he wants us to believe that he was referring to possible suspension or removal from the roll of attorneys by suggesting that Mr Pilson was a friend and that he was assisting him as such to buy a property.

[51] According to Mr Mabunda he bought the property in accordance with the arrangement they had. In the same breath Mr Mabunda admitted that the property he purchased 'was not the primary property which Mr Pilson had in mind and that the latter was not prepared to accept it. According to Mr Mabunda he then registered the property in his name. In conclusion Mr Mabunda then averred that he had no choice but to have it registered in his name until he could sell the property and then thereafter refund the money given to him.

[52] This story is not plausible. Mr Mabunda received the amount of R300 000.00 into his trust account. The money was not his. It belonged to Mr Pilson with specific instruction to Mr Mabunda to buy immovable property for Mr Pilson. His assertion to

Mr Reddy that the funds were not trust monies in my view was misguided and he knew it was not true either. That Mr Pilson in his letter of complaint to the Law Society 'never alleged that he was a client to Mr Mabunda', in my view, shows the extent to which Mr Mabunda did not regard his conduct as serious.

[53] His transfer of the amount of R300 000.00 from his trust account into his business account in tranches is telling. He was just simply helping himself and in his answering affidavit he elected not to be open to the court why such transfers trailed as follows:

9/11/2016	-	R50 000.00
16/11/2016	-	R25 000.00
21/11/2016	-	R75 000.00
29/11/2016	-	R75 000.00
30/11/2016	-	R50 000.00
07/12/2016	-	R25 000.00

[54] Seen in context, one can only conclude that this was another misappropriation and it could not have been about transfers from trust account to business account for the purpose of purchasing immovable property at an auction. It was meant to be used for other purposes than the mandate to buy immovable property at an auction. In any case, according to Mr Mabunda as he conveyed to Mr Reddy, he did not see the R300 000.00 as a trust money. As I said, he was wrong and he knew right at onset that it was trust money and that is why he deposited the R300 000.00 into his trust account then made staggered payment as he did. If indeed he thought it was not trust money but business, then he should have known better that in terms of Rule 35.10 'money other than trust banking account at any time should be transferred to a business banking account without undue delay'. So, whatever way one looks at it, the conduct was flawed and unprofessional.

[55] On 13 July 2016 Ms Nkosi lodged a complaint against Mr Mabunda in respect of a loss of support claim which she had instructed Mr Mabunda to lodge against the Road Accident Fund on her behalf. The claim was settled in the sum of

R2 605 275.00 and this amount was paid into Mr Mabunda’s trust account on 28 June 2015.

[56] Mr Mabunda misrepresented himself to Ms Nkosi by telling her that the Road Accident Fund settled the claim in the sum of R2 265 143.75. In other words, an amount of R340 132.00 was not disclosed to her. Out of the amount of R2 265 143.75 he deducted what he regarded as his 25% contingency fee and therefore intended to pay Ms Nkosi only R1 698 857.82.

[57] Mr Mabunda attempted to make the abovementioned amount of R1 698 857.82 by way of a cheque, but it was not accepted by the bank. This was then followed by three cheques in the amount of R500 000.00 each. Remember, the balance was R198 857.00 that is R1 698 857.82 plus R340 132.00 which was never disclosed to Mr Nkosi. The total amount paid to her was R1 500 000.00.

[58] His explanation to Mr Reddy at the time was that after the offer of settlement was presented to Ms Nkosi, she advised to obtain a financial adviser for the purpose of investing the proceeds of the claim and that Ms Nkosi accepted the amount of R1 698 857.82 in full and final settlement and that she therefore had no further claim against him.

[59] What else could Ms Nkosi have done when Mr Mabunda did not disclose the exact amount paid to him. In addition, he did not disclose the party and party costs paid to him by the Road Accident Fund. Misappropriation is also glaring in the matter of Ms Nkosi and in his explanation, this time as contained in his affidavit deposed to on 2 October 2018, he just simply in about a page dealt with the serious nature of the allegations as hereunder stated.

[60] He starts by mentioning that ‘*every allegation not explicitly admitted, is denied as if specifically denied and the applicant is to put to the proof thereof*’. This is motion proceedings which serve as pleadings and evidence. He is never going to have another chance to challenge ‘*any proof thereof’*. But of course that is the attitude when one does not have a defence or contrary version.

[61] He then further states that it was discovered later that Ms Nkosi was not the only claimant and that the second mandate was received and that a sub-file was included in the primary file and that the matter was then settled in a comprehensive settlement with the Road Accident Fund. I am unable to understand for what purpose does this explanation serve.

[62] The point is this: An amount was received from the Fund. Portion of it was not disclosed to client, including party and party costs amount paid. Trust cheque issued was returned and it is unbelievable that the bank refused to clear one trust cheque in the amount of more than one R1 000 000.00. If that was the case a confirmatory affidavit could easily have been obtained from the bank. His suggestion that misunderstanding was apparently caused by the fact that a single Actuary Report, covering the claims of both claimants, was received and that both matters were settled, is of no help to him.

[63] Mr Mabunda is misguided to think that once a complaint on serious allegations of this nature is withdrawn by a complainant, that should bring to end the investigation. The public will forever be at the receiving end if at every time when a complaint is lodged against an attorney, and the complainant is quickly approached and sorted out, or paid, then the complaint is buried.

[64] Mr Mabunda is also not being honest with himself and the court to state that 'to the extent that there was some delay in payment of the balance after the initial payments, it was cured by the complainant being ill and requiring a re-calculation with the involvement of her attorney'. It has not.

[65] The truth is, the first cheque that was issued was not accepted by the bank. He did not have sufficient money in the trust when he was supposed to pay and thus the staggered payment. For example, as at 29 February 2016 trust account had only R1700.00. As on 5 May 2016 the available balance amounted to R205.29. On the same day the amount of R198 857.82 which according to Mr Mabunda was due and payable to Ms Nkosi was no longer available in his trust banking account. Mr Mabunda in his affidavit deposed to on 2 October 2018 elected to be silent on these serious allegations. The conclusion can only be misappropriation and rolling of trust

funds to pay one trust creditor from the funds of the other or paying trust monies into business account and thereafter pay his own creditors from business account when not entitled to do so. The statement, 'at all relevant times I was financially strong enough to pay all the trust creditors fully', is devoid of any truth.

[66] For Mr Mabunda to persistently say: "*I did not misappropriate trust funds and no damage was caused. I never acted dishonestly. Even the formal "trust deficit" did not create a risk to any client or to the fidelity funds were available and eventually- paid',* as alluded to in paragraph 10.3 of his affidavit deposed to on 31 May 2019, in my view, displays lack of remorse and acceptance of fault. Therefore, his cry for mercy and second chance need to be seen in context.

[67] Is Mr Mabunda still fit and proper to remain on the roll? I do not think so. The triad alluded to in paragraph [11] of this judgment has been satisfied on various grounds. On 19 March 2008 he was found by the high court in Pretoria to have acted unprofessionally. He was suspended on certain conditions. The allegations of his suspension were made in paragraph 6.3 of the applicant founding affidavit deposed to on 2 October 2018. In his answering affidavit he elected to be mummed about the conditions of his suspension. He in fact said nothing about his previous suspension. With clear conscious, and insofar as he is seeking leniency, full disclosure was required. He should have been opened with the court to explain what were his transgressions, how he dealt with the conditions for his suspension, what those conditions were and what led him to the commission of those transgressions.

[68] It was only during argument when his counsel was engaged on lack of information regarding his previous suspension from practising as an attorney that the court order in relation to the suspension was produced, the contents of which was quite revealing. He was inter alia, ordered not to permit his trust account to be overdrawn or in deficit at any time and he should not be found guilty of any unprofessional, dishonourable and/or unworthy conduct whether at common law or in terms of any statutory enactment governing the profession of an attorney.

[69] In his oral argument counsel for the respondent, contended that despite previous finding of unprofessional conduct on the part of the respondent, removal

from roll of attorneys would be inappropriate. He suggested that the context for mercy is for the fact that he takes responsibility for the conduct of his bookkeeper Mr Maseko, auditor and or accountant for failure to keep proper books of account. Having expressed himself as he did, he then concluded:

"But what is mitigating is that neither Mr Maseko nor the auditor ever re-flacked these transactions and clean bill of health was given. They gave a clean bill of health all the time: Both Maseko and the auditor could also be guilty of unprofessional conduct and same extent is mitigating because he has system in place which did not warn, they should have warned him. In fact when it happened for the first time, he should have been warned".

[70] The statement in my view, is revealing. It is a blame shifting strategy which the SCA had the opportunity to speak about in the matter of Law Society, Northern Province v Mogami and Others 2010(1) SA 186 (SCA) at para 26 and also repeated in Law Society of Northern Province vs Sonntag [2011] ZASCA 204; 2012(1) SA 372 (SCA) in which it was stated: '*Instead of dealing with the issues they launched an unbridled attack on the applicant. It has become a common occurrence for persons accused of wrong doing, instead of confronting the allegations, 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'.*

[71] Sign of remorse is watered down when one justifies unprofessional conduct and dishonesty by shifting the blame to other people. This is almost like pleading 'admit and avoidance'. Mr Mabunda was told as per the court order of 19 March 2008 that he must never permit his trust account to be overdrawn or <u>in deficit at any time</u>. What did he do? He allowed it to be overdrawn and in deficit once more despite warning by the court on 19 March 2008. He was told to conduct himself at all times as a fit and proper person to practice as an attorney: But what did he do? He again degraded the profession and furthermore, blames this conduct again on his Accountant and or Bookkeeper like in the previous transgression. He transferred the whole client's trust funds from trust to business and then marked same as his fee or income and used the money to pay other creditors of his or certain clubs for his own use and or benefit. That showed dishonesty.

[72] This court was previously in the matter of Sonntag cited earlier in this judgment, criticised by the SCA for imposing a sanction of suspension instead of removal where dishonesty was proved. In paragraph 15 of the judgment Harms ADP as he then was, held at para 15:

"Nevertheless, despite finding that the respondent had been dishonest, the court below found that the reasons set out constituted exceptional circumstance, justifying a departure from the general approach, that where dishonesty was involved, removal from the roll should follow."

[73] Then in para [16] he proceeded:

"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 extensor 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. Comparison are odious and, as we stated by Harms ADP in Malan "facts 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. 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".

[74] In my view, continued attempt by Mr Mabunda to minimise the impact of his conduct on the profession as a whole and the public, reveals lack of understanding of his own conduct and his role and obligation as attorney towards his clients. All of this demonstrates that it cannot be assumed that Mr Mabunda will, after a period of suspension, be a fit and proper person to continue practicing as an attorney. The only suitable sanction in the circumstances of the case, is the removal of his name from the roll of attorneys.

[75] I did not understand the respondent to be strongly putting an argument regarding the costs of the application. The applicant has a statutory duty to approach this court. The applicant must therefore be entitled to costs of the

application and because of his unprofessional conduct and dishonesty it has to be on attorney and client scale.

[76] During oral argument the court also wanted to know as to whether the applicant as a professional body ever considered the provisions of Prevention and Combating of Corrupt Activities Act 12 of 2004 and in particular section 34(1)(b) which provides: 'Any person who holds an authority and who knows or ought reasonably to have known or suspected that any other person has committed the offence of theft, fraud, extortion, false or uttering of false document, involving an amount of R100 000.00 or more, <u>must</u> report such knowledge or suspicion or case such knowledge or suspicion to be reported to any public offices'. On the other hand, subsection (2) of section provides that 'subject to the provisions of section 37(2) any person who fails to comply with subsection (1), is guilty of an offence.

[77] The applicant as the watch-dog of the legal profession has the responsibility to ensure that its members do not flout the law and any sign of criminal activity in the execution of their professional responsibility, it becomes incumbent on the applicant to report such conduct to the police as contemplated in section 34(1) of Act 12 of 2004.

[78] In the result, I make an order as follows:

78.1 The respondent, Daniel Themba Mabunda is hereby struck off the roll of attorneys in accordance with paragraphs 1.1 to 1.3.5 of Part/Section B of the notice of motion dated 26 September 2018.

78.2 The respondent is hereby ordered to pay the costs of the application on an attorney and client scale.

78. 3 The applicant is hereby directed <u>to consider</u> reporting the conduct of the respondent as contemplated in section 34 of Act 12 of 2004.

LEGODI JP

I AGREE

A M KGOELE
JUDGE OF THE HIGH COURT

DATE OF HEARING:	:	03 AUGUST 2019
DATE OF JUDGMENT	:	09 OCTOBER 2019
FOR THE APPLICANT	:	ROOTH AND WELLSELS INC
	:	C/O SWANEPOEL & PARTNERS SUITE 601, THE PINNACLE BUILDING 1 PARKIN STREET SONHEUWEL MBOMBELA TEL: 013 753 2401 REF: MR SIEBRITS/Bernice/MAT28596
FOR THE RESPONDENT	:	D & M MABUNDA ATTORNEYS C/O NKWASHU MAGAGULA ATTORNEYS
	:	3RD CALTEX BUILDING, NO 32 BELL STREET MBOMBELA TEL: 083 319 6207 REF: DTM/TN/GEN1