

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

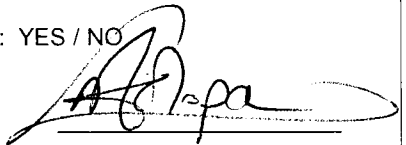
9/2/2017
CASE NO. 15293/2016

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

07 FEBRUARY 2017

DATE



SIGNATURE

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES

Applicant

(Incorporated as the Law Society of the Transvaal)

and

PULE ABRAM MOROBADI

Respondent

JUDGMENT

NOCHUMSOHN (AJ)

1. This is an application for the striking of the Respondent's name from the Roll of Attorneys together with ancillary relief.
2. Applications of this nature are *sui generis* and of a disciplinary nature. There is no *lis* between the parties. The Applicant, as custodian of the profession, merely places the facts before the court, for its consideration.¹
3. In terms of Section 22(1)(d) of the Attorneys Act No. 53 of 1979 ("the Act"), any person who has been admitted and enrolled as an attorney may on application by the society concerned be struck from the Roll or be suspended from practice by the court within the jurisdiction in which he practises, if, in the discretion of the court, he is not a fit and proper person to continue to practise as an attorney.
4. There are several criteria for the satisfaction of the relief, *viz*:
 - 4.1. It must be decided on the facts, whether the alleged offending conduct has been established.

¹ Hassim v Incorporated Law Society of Natal 1977(2) SA 757 (A) at 767 C – G;
Law Society of Transvaal v Matthews 1989 (4) SA 389 T at 393 E;
Cirota & another v Law Society Transvaal 1979 (1) SA 172 (A) on 187 H;
Prokureursorder van Transvaal v Keynhans 1995(1) SA 839 (2) on 851 E - F

- 4.2. In such event, the court must impose a value judgment upon such conduct to enable a decision as to whether or not such conduct renders the attorney fit and proper to remain in practice as an attorney.²
- 4.3. If in its discretion, the court determines that the attorney concerned is no longer a fit and proper person to remain in practice, it must decide, whether in all the circumstances, the attorney is to be removed from the Roll or merely suspended from practise. Such decision would turn on the severity and degree of the misconduct.³
- 4.4. The Court's discretion must be based upon the facts and such facts must be established on a balance of probabilities.⁴
- 4.5. Moreover, the facts upon which the Court's discretion is based should be considered in their totality rather than the consideration of each issue separately.⁵

² Law Society of the Cape of Good Hope v C 1986 (1) SA 616(A) at 637 C to A; A v Law Society of the Cape of Good Hope 1989 (1) SA 849 (A) at 851 A to E; Law Society Transvaal v Matthews supra at 393 I to J

³ Jussit v Natal Law Society 2000 (3) SA 44 (SCA) at 51 B to I; Law Society of the Cape of Good Hope vs Budricks 2003 (2) SA 11 (SCA) at 13 (I) and 14 A to B; Malan v The Law Society of the Northern Provinces (568/2007) {2008} ZASCA 90 (12/09/2008) at (4 – 9)

⁴ Law Society Transvaal v Matthews supra at 393 I to J; Olivier v Die Kaapse Balie-Raad 1972 (3) SA 485 (A) at 496 F – G; Summerley v Law Society Northern Provinces 266 (5) SA 613 (SCA) at 615 B – F. Malan v Law Society of the Northern Provinces (568/2007) {2008} ZASCA 90 (12/09/2008) at {9}

⁵ Law Society Transvaal v Matthews supra at 393 I to J; Olivier v Die Kaapse Balie-Raad 1972 (3) SA 485 (A) at 496 F – G; Summerley v Law Society Northern Provinces 266 (5) SA 613 (SCA) at 615 B – F; Malan v Law Society of the Northern Provinces (568/2007) {2008} ZASCA 90 (12/09/2008) at {9}

5. **THE OFFENDING CONDUCT**

5.1. There were two complaints lodged with the Applicant in relation to the conduct of the Respondent. Arising out of these complaints, the Applicant dispatched a chartered accountant and auditor in the employ of its monitoring unit, certain Mr A Reddy ("Reddy"), who conducted an investigation, pursuant to which Reddy filed a Report with the Applicant which was annexed to the Founding Affidavit ("the Reddy Report"). Reddy deposed to a confirmatory affidavit, which was annexed to the Applicant's founding papers, in which he confirmed the contents of his report.

5.2. In the Reddy Report, Reddy summarised the basis of the two complaints and unearthed a third instance of misconduct, all of which we will deal with hereinbelow.

5.3. **THE FIRST COMPLAINT**

5.3.1. The first complaint was lodged with the Applicant by Attorneys Haasbroek & Boezaart, acting on behalf of certain doctor Kgarume ("Kgarume") who had instructed the Respondent to attend to the administration of the estate of the late Ponky Kgarume.

5.3.2. Kgarume and the Respondent had signed a document purporting to be a contingency fee agreement on 16 May 2010 for the purposes of the administration of the estate of the said Ponky Kgarume, at an agreed fee percentage of 15%.

- 5.3.3. The Respondent ought to have known that the entering into of a Contingency Fee Agreement under the aegis of the Contingency Fees Act No. 66 of 1997, for the administration of a deceased estate, would be inappropriate, as payment of a contingency fee must be contingent upon the success of the matter. It is trite that there cannot be a question of success or failure in relation to the administration of a deceased estate.
- 5.3.4. The prevailing position is that an executor may charge 3.5% of the gross asset value of a deceased estate, as an estate administration fee, and no more, unless specifically authorised by the Master of the High Court⁶. Such tariff is prescribed in accordance with Section 51(1)(b) of the Administration of Estates Act 66 of 1965.
- 5.3.5. In the Answering Affidavit, the Respondent endeavours to justify the excess charged, by averring that in addition to having been mandated to attend to the administration of the estate of the late Ponky Kgarume, he was also instructed to claim the deceased's pension from the Government Employees Pension Fund, over and above the administration of the said estate.

⁶ Collie NO v The Master of the High Court 1972 (3) SA 63 (AD)

- 5.3.6. From the voluminous annexures attached to the papers, it is apparent that the estate's claim against the Pension Fund was pursued by the Respondent, by way of correspondence. There is no evidence on the papers that legal proceedings were instituted by the estate against the pension fund.
- 5.3.7. In the normal course of events, any executor in a deceased estate would pursue the recovery of claims in favour of an estate, by way of correspondence.
- 5.3.8. The writing of letters to secure claims in favour of a deceased estate would equate to no more than the discharge of an executor's function in the administration of a deceased estate. An executor is vested with the duty to collect all monies and/or claims due to the estate, to reflect same in the Liquidation and Distribution Account and to transfer such monies and/or cede such claims to the heir. This is the function of an executor, for which the prescribed tariff of 3.5% prevails.
- 5.3.9. Unless extraordinary steps are taken by the executor in the pursuance of claims, which would necessitate the institution of legal proceedings, there would be no basis for additional charges to be raised over and above the prescribed tariff of 3.5%.

- 5.3.10. The Respondent stepped into the shoes of the executor, inasmuch as Kgarume had been appointed by the Master of the High Court as executor and had executed a Special Power of Attorney in such capacity, in favour of the Respondent, authorising and instructing the Respondent to take all such steps on his behalf for the effective administration of the estate.
- 5.3.11. Whilst an executor is bound by the prescribed tariff and may only deviate therefrom, if consent is granted by the Master in accordance with Collie NO v The Master of the High Court 1972 (3) SA 63 (AD) supra, an attorney who administers a deceased estate under a Special Power of Attorney granted in his favour by the executor is not bound by the tariff and may charge a reasonable amount as may be agreed to between the executor and his attorney.
- 5.3.12. One would expect that other than in extraordinary cases, an attorney administering a deceased estate on behalf of an executor whilst acting under a Special Power of Attorney granted by an executor, as was the case in this instance, would not charge a rate excessively in excess of the legislated tariff and would look to such tariff as a guideline.
- 5.3.13. From the Liquidation and Distribution Account which was annexed to the founding papers, it is apparent that the gross asset value in the estate of the late Ponky Kgarume totalled R835 652.99, 3.5% of which equates to R29 247.85.

- 5.3.14. Item number 3 of such Liquidation and Distribution Account reads "*Executor's fees 3.5% on R835 652.99 - R25 069.58*". Whilst nothing much turns on the obvious arithmetical error between R29 247.85 and R25 069.58, the clear intention was to lodge a Liquidation and Distribution Account on the basis that the executor's remuneration would be reflected at the legislated tariff.
- 5.3.15. The only additional fees reflected in such Liquidation and Distribution Account appear at item number 4, which reads "*Morobadi Attorneys Incorporated transfer costs Erf 1217 – R9 604.20*". This fee is clearly a conveyancing fee for the transfer to the heir of the estate's immovable property reflected at item number 1 of such Liquidation and Distribution Account.
- 5.3.16. The two fees reflected of R25 069.58 and R9 604.20 total R34 673.78. It is approximately this amount which one would have expected the Respondent to have charged, for both the administration of the deceased estate as well as for the associated conveyancing, which is always charged for in addition to the legislated executor's remuneration.
- 5.3.17. From the Reddy Report it is apparent that a cumulative amount of R67 726.80 was paid to the Respondent as fees for services rendered in the administration of the estate of the late Ponky Kgarume.

- 5.3.18. The illegitimate Contingency Fee Agreement provided for payment to the Respondent of a fee equating to 15% of the gross asset value of the estate. 15% would have equated to the sum of R125 347.94. However, the Respondent charged substantially less, being the aforesaid amount of R67 726.80. This notwithstanding, the latter amount is almost double the amount which the legislated tariff plus the aforesaid conveyancing charge would have yielded. To this end, it is quite apparent that the Respondent has over-reached his client, Dr Kgarume.
- 5.3.19. A further factor which militates against the Respondent, lies in his transgression of Section 51(4) of the Administration of Estates Act 66 of 1965, which prevents an executor from receiving any remuneration before the estate has been distributed as provided for in Section 34(11) or 35(12), as the case may be, unless payment of such remuneration has been approved in writing by the Master of this Court.
- 5.3.20. Far more disturbing than the entering into of the ill-conceived Contingency Fee Agreement, the said over-reaching and the breach of Section 51(4) of the Administration of Estates Act, is the fact that a cumulative amount of R48 000.00 was paid by the Respondent out of the funds of the estate of the late Ponky Kgarume (over and above the fees of R67 726 .80) into the Respondent's business account. The Respondent admits these

cumulative payments but ascribes such payments to a loan to his firm.

5.3.21. The Respondent, in his Answering Affidavit, avers that he was *“swimming in debt at that time and was experiencing serious cash flow problems”*. He was in arrears with his rental and other operational expenses such as telephone bills, had borrowed monies from family and friends to keep the practice running, was finding it difficult to survive taking into account that operational costs and sundries had to be paid in order for the practice to function. Even though he had debited fees of R67 726.80, he avers that the amount was not enough to cover the amounts due by his practice, in terms of arrear and current expenditure. He found himself, as a young practitioner at the time, in an undesirable situation where he had to *“loan”* money from the estate late account.

5.3.22. The Respondent avers further that he had at that stage invoiced Dinokeng Tsa Taemane Municipality for services rendered and was expecting the payment, his intention being that when he *“loaned”* the money from the estate late bank account, he would repay the *“loan”* as soon as he received payment from the municipality.

- 5.3.23. The Respondent averred further that when the payment was not made by the municipality he, of his own volition, informed his client, who was a close member of his family, that he had “loaned” the money and undertook to repay same. The Respondent set out in his papers he had learnt a lesson from this conduct, for which he was deeply sorry. The Respondent showed deep remorse for this conduct, faced financial ruin at a very early stage of opening his practice, was without funds or solutions to his problems, and clearly had every intention of effecting the repayment of these funds against receipt of monies from Dinokeng Tsa Taemane Municipality.
- 5.3.24. Whilst these admissions by the Respondent are mitigating and from the papers it is clear that the Respondent has repaid the R48 000.00 and has shown substantial remorse, the Court is still nevertheless faced with an attorney having helped himself to R48 000.00 from a deceased estate bank account under his control, without the knowledge or consent of his client, the executor.
- 5.3.25. Financial misconduct on the part of an attorney is the most serious breach of a fiduciary relationship that an attorney has with his client. Such conduct completely erodes the very trust which the public ought to be in a position to place in the legal practitioners who represent them and undertake their affairs.

5.3.26. Out of all the rules, codes of conduct, ethical standards and norms applicable to the attorneys' profession, the most sacrosanct are those pertaining to the handling of trust monies. Whilst monies in a deceased estate under the care and control of an attorney are not regulated in the same manner as trust funds in an attorney's trust account, from the attorney's perspective, such monies require the same nurturing and care as trust funds and are for all intents and purposes, inseparable from trust funds. Thus the helping himself to the cumulative amount of R48 000.00 without the knowledge or consent of his client is a very serious factor militating against the Respondent.

5.3.27. The mitigating factors for the Respondent, in relation to this complaint, lie in the following facts:

5.3.27.1. before the complaint was lodged with the Law Society, the Respondent approached his client and admitted to what he had done and undertook to repay the money and did so repay the money;

5.3.27.2. this incident took place some six years ago and there has been no further evidence of any misappropriation of trust funds or any estate funds under the Respondent's control;

5.3.27.3. the Respondent was a very young practitioner at the time that he entered into the contingency fee agreement and did not have the benefit of years of experience to have known that it was incompetent to enter into a contingency fee agreement in relation to the administration of a deceased estate;

5.3.27.4. the Respondent did not charge the full 15% provided for in the contingency agreement and limited himself to half of what the agreement provided.

5.4. **MISCONDUCT UNEARTHED BY REDDY**

5.4.1. In the course of his investigation, Reddy unearthed conduct on the part of the Respondent, in relation to certain DK Manganya, whom the Respondent represented in a claim against the Road Accident Fund. Pertinent to note: at no time did Manganya report the Respondent to the Applicant for any form of misconduct.

5.4.2. Reddy ascertained that:

5.4.2.1. Manganya had signed a Contingency Fee Agreement with the Respondent, stipulating a fee equating to 25% of the capital amount to be retained, on success of Manganya's claim against the Road Accident Fund.

5.4.2.2. On 5 June 2014, the Respondent's firm received into its trust account an amount of R1 352 780.00. Upon 25 June 2014, a further amount of R103 781.59 in respect of taxed costs was received.

5.4.2.3. The trust ledger account of Manganya, in the Respondent's books of account reflected that a cumulative amount of R591 976.59 was paid out of the Respondent firm's trust account into its business account.

5.4.2.4. Reddy noted that the Respondent charged Manganya a fee amounting to R338 195.00, equating to 25% of the capital in accordance with the Contingency Fee Agreement and had also retained the party and party costs of R103 781.59, in lieu of recovering disbursements.

5.4.3. Applying simple arithmetic, the 25% fee to which the Respondent was entitled in the sum of R338 195.00 plus the taxed costs recovered of R103 781.59 plus the sum of R150 000.00 equals the amount of R591 976.59 which was paid out of the Respondent's trust account, drawn against the ledger account of Manganya and paid into the Respondent's business account.

5.4.4. The Respondent avers that he was entitled to retain the taxed costs recovered of R103 781.59 in lieu of recovering disbursements from his client and that the amount of R150 000.00 was a gratuitous amount paid by Manganya, as an expression of his satisfaction for good service. The Respondent attached a Confirmatory Affidavit to his Answering Affidavit by Manganya to this effect. The relevant paragraphs of such Affidavit read as follows:

“2. *I willingly and personally out of my own will offered and gave Mr Pule Morobadi of Morobadi Incorporated the amount of R150 000.00 on top of the 25% which was due to his Law Firm.*

3. *I confirm that Mr Pule Morobadi of Morobadi Incorporated had explained to me that he was only entitled to 25% as per our agreement however I still decided to add more to thank him.”*

In addition, the Respondent annexed to his answering affidavit, a letter addressed by him to Manganya, dated 28 May 2014, the relevant portions of which read:

“We confirm that Mr Manganya was informed of the fact that he was only liable to pay 25% of the claim as our professional fees and he understands same. He offers this as a gesture of

thankfulness for the overwhelming effort he has experienced from our service intervention in assisting him. By signing this letter, he confirms that the amount of R150 000.00 be paid to Mr P Morobadi, in his personal capacity, as a way of showing appreciation for the diligent service offered. He confirms that he signs this letter with no undue influence and is happy to do so voluntarily. He releases these funds with no intention to reclaim the monies back from Mr Pule Morobadi, and indemnifies Mr Morobadi against any future claims."

It is important to note that this letter bears the signature of both the Respondent and Manganya and such signature of Manganya is dated 28 May 2014, below the words "*confirmed*".

- 5.4.5. It is noteworthy that Manganya's Confirmatory Affidavit is silent upon the retention by the Respondent of the taxed costs in the sum of R103 781.59 in lieu of the recovery of disbursements, in circumstances where one would have expected the gratuitous client to have been apprised of his rights to his taxed costs against the recovery of the actual disbursements incurred. Had Manganya been aware of his right to receive his taxed costs and be debited with the actual disbursements incurred, one would have expected the Respondent to have set such facts out in detail in his opposing papers, which likewise ought to have been confirmed by Manganya.

- 5.4.6. The failure to have dealt with this issue in Manganya's affidavit gives rise to the suspicion that Manganya had not been informed of his right to recovery of his taxed costs, with the result that his gratuity, without his knowledge, would have been in excess of the R150 000.00, to the extent of the difference between the taxed costs and the actual disbursements incurred, which were not quantified in the papers.
- 5.4.7. Whilst the Respondent has breached the Contingency Fees Act by retaining the taxed costs of R103 781.59 in lieu of the recovery by him of the actual disbursements incurred, there was some doubt as to the norms of practice within the organised attorney's profession in relation to the retention of taxed costs. Mr Molele for the Respondent drew to our attention that in the minute of the meeting of the council of the Applicant, in which it was resolved that the Application be launched, one Mr Janse Van Rensburg was recorded to have said that there was a general misconception amongst members in relation to costs and suggested that members be alerted of the correct position by way of a Newsflash, which proposal was accepted.
- 5.4.8. Mr Molele argued further that the accepting of the further R150 000.00 may have been undesirable and could strike at the conscience of a practitioner, but could not be viewed as a contravention of the Contingency Fees Act, given that same was paid on a gratuitous basis by the client, with knowledge of the fee limitation.

5.4.9. The mitigating factors for the Respondent lie in the following:

5.4.9.1. Manganya had not reported any form of misconduct to the Applicant, the issues in relation to whom were raised by Reddy;

5.4.9.2. from the minute of the Council of the Applicant, filed of record, there was uncertainty at the time as to the position in relation to the retention of taxed coasts, necessitating the dispatch of a news flash;

5.4.9.3. Manganya was aware of the fee limitation of 25% and chose to pay the additional R150 000.00 as a gift to the Respondent.

5.5. **THE SECOND COMPLAINT**

5.5.1. On 23 July 2015, the Applicant received a complaint from Moses Mpendulo Radebe ("Radebe"), the Deputy-Director of the Anti-Fraud and Corruption Unit of the Gauteng Province, Department of Human Settlements ("the Department").

5.5.2. The nub of the complaint was that the Respondent was refusing to meet with the Department to review both the work which the Department had appointed him to undertake, as well as the payments received by him pursuant to such work.

- 5.5.3. The Respondent replied to the complaint, which response was accompanied by a letter from one Advocate Dineo Gomba, the senior legal adviser and Deputy Information Officer at the Gauteng Department of Human Settlements (“Gomba”) dated 21 August 2015. In such response, the Respondent states that Gomba indicated that the mandate given to him was performed to her satisfaction. The Respondent went on to add that there was therefore no reason to bring the matter to the Law Society.
- 5.5.4. Moreover, Gomba, in the said letter of 21 August 2015 adds that the inquiry to the Law Society was premature as the matter was internal and the complainant, Radebe, did not have the authority to contact the Applicant, especially when proper internal processes had not been followed.
- 5.5.5. The said letter is signed by Gomba in her capacity as Senior Legal Adviser and the Deputy Information Officer of the Complainant.
- 5.5.6. Gomba, in the aforesaid letter masquerades as a higher form of authority in the house of the complainant over that of Radebe, who lodged the complaint on its behalf. The letter was clearly written with a view to inducing the Applicant into withdrawing the complaint against the Respondent.

5.5.7. On 7 September 2015, Radebe notified the Applicant that Gomba had been suspended for “*amongst other things her response to the Northern Province Law Society*”.

5.5.8. On 19 November 2015, Ms Papadi Makhetha, the director of the Anti-Fraud and Corruption Unit of the Gauteng Province, Human Settlements addressed a lengthy letter to the Applicant (attached to the Founding Affidavit as Annexure 9). Such letter sets out, in summary, the following:

5.5.8.1. On 1 April 2015, the Bid Adjudication Committee (“BAC”) held a meeting to consider a request for approval of payment to the Respondent, for services rendered, which request had been presented by Gomba.

5.5.8.2. The Respondent had been mandated to draft the Department’s Promotion of Access to Information Manual, its Records Management Policy and to institute litigation process for cancellations of title deeds due to fraud, which last service emanated from an investigation conducted by the Anti-Fraud and Corruption Unit.

- 5.5.8.3. Concerns were raised by the BAC who noted that exorbitant fees had been charged by the service provider, in circumstances where Legal and Advisory Services could not provide reasons why the fees were not capped. In addition, it was noted that there were excessive fees with regard to the cancellation of one title deed, where Gomba had provided an estimate of approximately R300 000.00.
- 5.5.8.4. After investigation, the Department found that Gomba had prepared invoices on behalf of the Respondent, who was required to choose and insert the date on the invoice, place them on a letterhead and re-send them to Gomba to process payment.
- 5.5.8.5. The Department's findings regarding invoices 1021 to 1023 were that the Respondent was paid an amount of R1 409 969.00 in October 2014 under invoices 1016 to 1018 dated April and May 2014 for doing similar work. The supporting documentation attached to both set of invoices 1016 to 1018 and invoices 1021 to 1023 are identical, inferring that the Respondent had invoiced the Department twice using the same supporting documents for services he supposedly rendered.

- 5.5.8.6. The Department's findings on its Digital Forensic Analysis were that Gomba colluded with the Respondent to defraud the Department in an amount of R1 687 844.00 already paid to the Respondent and to further defraud the Department in an amount of R1 226 194.40 in relation to invoices submitted to the BAC for payment.
- 5.5.8.7. The Department recommended that its Legal and Advisory Services Directorate should instruct the State Attorney to institute legal proceedings to recover an amount of R1 687 844.00 from Gomba and the Respondent, jointly, in respect of payments for services not actually rendered by the Respondent.
- 5.5.8.8. Regarding a legal opinion purportedly prepared and submitted by the Respondent, the opinion was allegedly prepared and sent to Ms Gomba by Malebye Motaung Mtembu Attorneys ("MMM Attorneys") in May 2012, was plagiarised and illegally appropriated from MMM Attorneys by the Respondent, with identical footnotes, case law and everything in the document.

- 5.5.9. The Applicant set out the entire complaint by the Department of Human Settlements in paragraph 16 of the Founding Affidavit and attached the correspondence referred to above as annexures. Annexed to such correspondence was a copy of an affidavit deposed to by the said Papadi Makhetha in litigation between the Department of Human Settlements and certain Lisa Nkonjane and others, as well as letters from MMM Attorneys.
- 5.5.10. One would have expected the Respondent to have dealt with these paragraphs in great detail in his Answering Affidavit. Yet, against these damning allegations, the Respondent merely avers that he did receive instructions from the Department to render legal services for the preparation of a manual, which he prepared, completed, submitted and drafted Affidavits as well as legal opinions for the Department.
- 5.5.11. When probed by us in the course of argument, as to the reasons for the Respondent's failure to have dealt with these serious allegations, Mr Molele submitted that on the Respondent's version, he did the work for the Department, presented his invoices and was paid for the services rendered.
- 5.5.12. The Respondent delivered a notice in terms of Rule 35(12), in which he called for, inter alia copies of:

- 5.5.12.1. All documents from the Disciplinary Department calling upon the Respondent to appear for an Inquiry under Section 71 of the Act;
- 5.5.12.2. The Record of the inquiry proceedings against the Respondent;
- 5.5.12.3. Council's or committee's judgment against the Respondent;
- 5.5.12.4. Written Report of the findings of the Committee to the Council together with recommendations that the Respondent be removed from the roll of practitioners;
- 5.5.12.5. The minutes of the meeting that was held at the offices of the Law Society on 19 November 2015 with the complainant Radebe and his senior Ms Papadi Makhetha;
- 5.5.12.6. The digital forensic analysis report upon which the Bid Adjudication Committee of the Department of Human Settlements made its findings;
- 5.5.12.7. The Record of the proceedings in which the Council considered all the facts available to it concerning the Respondent;

5.5.12.8. The Record of the proceedings in which it was concluded by the Council of the Applicant that the Respondent had made himself guilty of unprofessional or dishonourable or unworthy conduct;

5.5.12.9. The Minutes of the meeting of the Council of 27 November 2015.

5.5.13. The Applicant filed a reply to the Respondent's Notice in terms of Rule 35(12), from which it was apparent that there was no Disciplinary Inquiry in terms of Section 71 of the Act. Moreover the Applicant attached a copy of the Reddy Report and a memorandum from Jalo Heroldt of the Disciplinary Department ("Heroldt") to the Council, requesting that the Council take steps to remove the Respondent from the roll of attorneys, as well as the minutes of the Council meeting, in which it was resolved to launch this application. Attached to the memorandum by Heroldt is a document headed "*Recommendation by the Disciplinary and/or investigating committee chaired by CR Du Plessis*", in which it was recommended that the Respondent appears before a Disciplinary Committee, to answer charges of *inter alia*, Fraud. Furthermore in such reply, the Applicant states that it is not in possession of the digital forensic analysis report on which the Bid Adjudication Committee of the Department of Human Settlements had made its findings.

6. In his answering affidavit, the Respondent takes issue with the Applicant for having ignored the recommendation of the Disciplinary and/or Investigating Committee, by failing to have taken steps to orchestrate a disciplinary inquiry. The Respondent avers that by such failure, the Council of the Applicant bypassed its own process in terms of its own rules and ignored the recommendation, rendering the Application to this Court, for the removal of his name from the Roll, as unlawful and illegal.

7. In argument, Mr Molele raised that Heroldt did not have the authority to make a recommendation and by doing so, she was usurping the function of the committee, which cuts across the principles of legality. In accordance with such principles, it was argued that by making such recommendation, Heroldt was acting beyond her powers and that such conduct was *ultra vires*.

8. In response to this argument raised by the Respondent, the Applicant avered in its replying affidavit that this court is empowered to grant the relief sought, in terms of Section 72(6) of the Attorneys Act, which reads:

“(6) The provisions of this section shall not affect the power of-

- (a) a society to apply in terms of the provisions of this Act for the suspension from practice or the striking from the roll of any practitioner against whom an enquiry is being or has been conducted in terms of this Act in respect of the conduct which forms or formed the subject matter of such enquiry.*

- (b) a competent court, at the instance of the society concerned, to suspend any practitioner from practice or to strike him from the roll.”*

9. In the normal course of events, the disciplinary process of the Applicant would be to convene an enquiry in terms of Section 71 of the Act. In terms of Section 71(1) of the Act, the Council of the Applicant **MAY** {my emphasis} enquire into cases of alleged unprofessional, or dishonourable or unworthy conduct on the part of any attorney. Such enquiries are usually conducted by committees of the Council, formed under Section 67 of the Act.

10. Such enquiries are held in accordance with the Rules of the Applicant. The Rules of the Applicant, made under authority of Section 74(1) of the Act and promulgated in Government Gazette No. 7164 of 1 August 1980 and all the subsequent amendments thereto, were repealed in *toto*, and replaced by the *Rules for the Attorneys' Profession*, published in Government Gazette No. 39740, 26 February 2016, being Notice 2 of 2016 and approved by the Chief Justice of South Africa in consultation with the Judges President of the Gauteng and North West Divisions of the High Court in terms of Section 74(2) of the Act, and such rules came into effect upon 01 March 2016. The upshot is that the Rules applicable to the case *in casu* would have been the prior rules which were repealed by publication of the notice aforesaid, the application having been issued prior to 01 March 2016.

11. The applicable prior rule governing disciplinary proceedings was Rule 95 (replaced by the present Rule 50), which empowered the council through a committee formed under Section 67 of the Act to either prosecute an offender by way of a formal disciplinary enquiry, alternatively to call upon a member to appear before an investigative committee, in order to elucidate and explain the particulars surrounding any complaint. Such investigating committee, after hearing all submissions, would then consider the matter, and either recommend that the complaint be dismissed or

that the attorney be formally charged under the rules and brought before a formal disciplinary enquiry.

12. If brought before a formal disciplinary enquiry, the member would be called upon to face a detailed charge, to appear before a disciplinary committee, to plead to the charge and to present oral evidence. Witnesses are called by both the complainant as well as the member and evidence is adduced under oath. In many ways, such enquiry resembles a quasi-trial, the purpose of which is for the disciplinary committee to determine the guilt or innocence of the member upon the charges brought.
13. The most important rule governing the procedure in circumstances where a member is convicted of a charge and it is sought to have the member suspended from practice or struck from the roll, is rule 101 which reads:

"101.1 Should an enquiry be held before a committee appointed by the council in terms of Section 67 of the Act, and at the conclusion of the enquiry, the practitioner be found guilty of unprofessional, or dishonourable or unworthy conduct, in terms of Section 72 of the Act, the committee may impose any punishment in respect thereof which is permitted in terms of Section 72 of the Act; provided that if at any stage during the enquiry, the committee is of the opinion that the conduct of the practitioner is such as to warrant an application by the society in terms of the Act for suspension from practice or the striking from the roll of the practitioner, it shall:

101.1.1 *as soon as possible submit a written report on its findings to the council, together with its recommendations regarding the suspension from practice or the striking from the roll of the practitioner;*

101.1.2 *at the same time deliver a copy of its report and recommendations to the practitioner and call upon the practitioner to furnish the council with representations in writing, within such period as the committee considers reasonable, but in an event within not less than seven days, why application should not be made for suspension from practice, or as the case may be, for the striking from the roll of the practitioner.*

101.2 *On receipt of the report and written recommendations of the committee, in terms of rule 101.1.1, and the written representations of the practitioner, in terms of rule 101.1.2, the council shall consider the matter and shall:*

101.2.1 *if it shall decide to proceed with an application for suspension from practice or for striking from the roll, advise the practitioner accordingly and take such further steps as may be necessary in that regard; or*

101.2.2 *if it shall decide not to proceed with an application for suspension from practice or for striking from the roll, refer back to the committee, together with a copy of the written representations of the practitioner, for the committee to dispose of as it sees fit; or*

101.2.3 *if it considers it appropriate, call upon the practitioner, upon not less than seven days' notice, to appear before the council at such time and place as the council may determine to show cause why application should not be made for suspension from practice or for striking from the roll of the practitioner; provided that if the practitioner does not furnish written representations to the council as requested, or fails to appear before the council, as the case may be, the council shall be entitled to consider the report and recommendations of the committee, in the absence of such representations, or in the absence of the practitioner.*

14. It is clear from the annexure to the memorandum by Herholdt of 06 November 2015, comprising a recommendation that the respondent be summoned before a disciplinary committee to answer charges of, *inter alia*, fraud, that the presiding committee was no more than an investigative committee in terms of Rule 95, who recommended that formal charges be brought before a disciplinary committee.

15. The question that then begs to be asked is whether it was competent for Herholdt to request, as she did, that the Applicant moves to launch this striking application, or whether the Applicant was duty bound to follow the recommendation of the investigative committee by proceeding with a formal disciplinary enquiry.
16. Had the Applicant followed the recommendations of its investigating committee and called upon the respondent to appear before a disciplinary committee, such committee would have been in a position to probe the serious allegations made by the department of Human Settlements, under oath. It would have been possible to call both Ms Papadi Makhetha and Radebe to testify at such enquiry, under oath. It may have been possible for such parties to adduce the said forensic analysis report, upon which the findings of the Bid Adjudication Committee were based. The Respondent would in those circumstances have had an opportunity to cross examine such witnesses and adduce evidence of his own in response to the serious allegations made.
17. Moreover, had such process been followed and in the event that such disciplinary committee may have convicted the Respondent and sought to bring about his striking from the roll or suspension from practice, it would have been necessary to follow the detailed process set out in the Applicant's Rule 101. Had such rule been followed, it would have been incumbent upon such disciplinary committee to submit a written report, together with its recommendations to the council, who would have been duty bound to invite the Respondent to make his representations in writing to the council, before the council would have been able to decide whether or not to proceed with this application.

18. Perhaps the answer to the question as to whether Herholdt could have made the recommendation which she did, to the council and whether the council could have acted thereon without following its aforementioned process, lies in an analysis of Section 67, as read with Section 72(6) of the Act. In terms of Section 67, the Council *may* [my emphasis] appoint committees to assist with the carrying out of its functions. Specifically, in terms of Section 67(2), a Council would not be divested of any power which it may have assigned to a committee and may amend or withdraw any decision of such committee, provided that if the committee has been assigned to enquire into a case of alleged unprofessional, or dishonourable or unworthy conduct, the council may not amend or withdraw any decision arrived at by such committee.
19. We can find no merit in the Respondent's argument that the Applicant was bound by the decision of its committee. In the first instance, the committee was not a disciplinary committee, but rather an investigative committee and moreover, the decision was not a decision in the form of a finding with the implementation of a punitive measure, but was no more than a mere recommendation to escalate the matter to a formal charge before a disciplinary committee.
20. In the circumstances, it was not peremptory for the council to have pursued a formal charge before a disciplinary committee, if in the opinion of the council, the Respondent was no longer considered to be a fit and proper person to remain in practice as an attorney. The Applicant passed a resolution to bring an application for the relief sought in these proceedings, as it was entitled to do, in accordance with Section 72(6) of the Act, (as read with Section 22(1)(d)), which specifically provides that the provisions of Section 72, which sets out the Council's disciplinary powers,

would not affect the power of the applicant to apply for the suspension from practice or the striking from the roll of any practitioner against whom an enquiry is being or has been conducted in terms of the Act, in respect of the conduct which forms or formed the subject matter of such enquiry.

21. There was nothing *ultra vires* in the actions of Heroldt. Heroldt is a legal official in the employ of the Applicant, who did not recommended that this application be launched. She merely requested that the Applicant proceed with an application to have the Respondent's name struck from the roll. Whilst the request was not *ultra vires*, we would discourage the Applicant from acting upon requests of this nature, as by doing so, the perception would be created that the council of the Applicant could be persuaded to place a higher emphasis and act upon the requests of its staff members, rather than the requests and recommendations of its investigative and/or disciplinary committees.
22. Having regard to the foregoing, it stands to reason that the council of the Applicant was entitled to pass a resolution for the launching of these proceedings, without the convening of a formal disciplinary enquiry, which the Applicant would be fully entitled to do, in suitable cases, which require the immediate attention of the court. However, by sidestepping its process and rules and by resolving to launch an application of this nature in terms of Section 72(6) of the Act, the Applicant acts at its own peril if the facts and circumstances giving rise to the relief sought are untested and no more than allegations which have not been made on affidavit and in respect of which the probative value may be questionable without having followed due process.

23. Whilst the allegations against the Respondent by Ms Papadi Makhetha are serious and damning, which if proved would undoubtedly leave the Respondent in the position that he would then no longer be a fit and proper person to remain on the roll of practitioners, we cannot accept such evidence, unchallenged, which was not adduced under oath in these proceedings, least of all without the benefit of any oral evidence having been led under oath before a disciplinary committee, without the findings of a disciplinary committee, without a report under Rule 101, without the Respondent having been given an opportunity to respond to such report, without the council having considered any such report or the respondents responses thereto. It seems grossly harsh to strike the Respondent from the roll, or suspend him from practice upon the basis of nothing more than a letter which is not supported by any affidavit or any evidence under oath in these proceedings. At the very least, the Applicant could have obtained a confirmatory affidavit from Ms Papadi Makhetha, confirming the correctness of her letter dated 19 November 2015 as well as the copy of the affidavit which was annexed, against Lisa Nkonjane. Without this much, in relation to the complaint the Applicant cannot be said to have passed the first leg of the test required for the relief sought and that is that on the facts presented the alleged offending conduct has not been sufficiently established in accordance with acceptable laws of evidence, to mete out a conviction in terms of the Applicant's own rules. Without it having been peremptory, had the Applicant followed its disciplinary process, these damning allegations may have been established with sufficient a degree of certainty to meet the first leg of the test.

24. Accordingly, when all of the other conduct is cumulatively assessed, it draws us to the conclusion that it certainly was unprofessional and dishonourable, if not unworthy on the part of a practitioner, for the Respondent to have taken and used for his own account, R48 000.00 out of the Estate of the Late Kgarume, without the knowledge of the executor, to have overcharged the estate as he did, to have taken his fee prematurely, as he did, and to have retained the taxed bill of costs of Mr Manganya. Had the Respondent been called before a disciplinary enquiry on these charges, he would probably have been fined or reprimanded in accordance with Section 71 (a) of the Act and it is doubtful that any committee would have considered such conduct to be sufficiently serious so as to warrant a suspension from practice or a striking from the roll, given all of the mitigating factors referred to above.
25. All aspects considered, and upon application of the applicable tests, enunciated above, upon the facts, cumulatively assessed and correctly contextualised as presented, there is insufficient offending conduct established to motivate a striking from the roll or suspension from practice. This may not have been so, had the allegations made by the Department of Human Settlements been proven facts. Given the mitigating factors in relation to the other conduct, even though such conduct is dishonourable, when imposing a value judgement upon such conduct, we do not consider same to be such so as to render the Respondent unfit to remain in practice as an attorney.

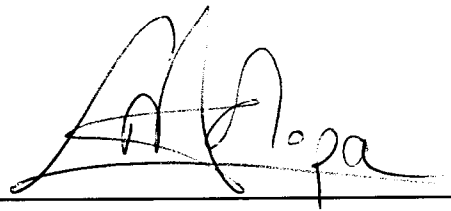
26. Accordingly, whilst it was competent for the Applicant to sidestep its disciplinary procedures and to launch this application, in these particular circumstances, it was undesirable for the Applicant to so conduct itself, as by doing so, the Applicant was unable to prove its case with sufficient degree of certainty to establish the necessary facts. There may be many other instances where the immediate launching of an application of this nature is warranted without the Applicant undergoing its usual disciplinary procedures and the remarks made in this judgement are not to be construed as a limitation of the Applicant's power to so conduct itself in future matters. However, the Applicant ought to exercise utmost care and discretion in considering when to launch applications of this nature, without following its usual disciplinary procedures.
27. Whilst in terms of the principles enshrined in Prokureursorde van Transvaal v Kleynhans 1995 (1) SA, the Applicant would be entitled to costs, on the scale as between attorney and own client, irrespective as to the outcome of the proceedings, we are vested with a discretion in relation to costs and do not believe that it would be just or equitable to visit the Respondent with the burden of having to pay the Applicant's costs.
28. In all of the circumstances, we make the following order:
- 28.1. The application is dismissed;
- 28.2. Each party is to bear its own costs.



NOCHUMSOHN, G

ACTING JUDGE OF THE HIGH COURT

I AGREE



MOLOPA-SETHOSA, LM

JUDGE OF THE HIGH COURT

On behalf of Applicant:

Attorney P Moonsamie

Instructed by:

Iqbal Mahommed Attorneys

On behalf of the Respondent:

Adv SN Molele

Instructed by:

Victor Mabe Attorneys

Date of Hearing:

01 December 2016

Date of Judgment: