REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA

(GAUTENG PROVINCIAL DIVISION, PRETORIA)

CASE NO: 45601/2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

20/4/2015

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES Applicant

and

JOSEPH JOSHUA WILKINSON Respondent

J U D G M E N T

MAKGOKA, J

[1] This is an application by the Law Society of the Northern Provinces (the Law Society) to have the respondent suspended from practising as an attorney, as well as related ancillary relief. The respondent was admitted as an attorney and conveyancer of this court on 6 June 1996 and 4 December 1997 respectively. He practiced for his own account in Pretoria under the name of Wilkinson Attorneys until 4 November 2014 when he was suspended from practice by this court at the instance of the Law Society, pending an application by the Law Society for the removal of the applicant's name from the roll of attorneys.

[2] The application by the Law Society was launched on 20 June 2014. The respondent opposed the application but failed to deliver his answering affidavit timeously. The matter served before this court on 15 July 2014, on

which occasion this court extended the period within which the respondent was to deliver his answering affidavit to 8 August 2014. Pending the determination of the application, respondent was prohibited from operating his trust account. A curator was appointed to operate the respondent's trust account. The matter was postponed to 4 November 2014.

[3] On 4 November 2014 the respondent had still not delivered his answering affidavit. An order was issued suspending the respondent from practice, with ancillary orders relating to the management of the respondent's practice. The respondent was ordered to deliver his answering affidavit on or before 5 January 2015. The matter was postponed to 25 February 2015. Although the respondent delivered his answering affidavit later than the date ordered by this court, nothing turns on this as the Law Society has also delivered its replying affidavit without murmur. That, briefly is how we became seized of the matter.

[4] The gravamen of the Law Society's application is that the respondent has, in contravention of the Law Society's rules, failed to account to clients promptly in respect of monies entrusted to him, after being requested to do so. The genesis of the complaints is the purchase and transfer of immovable property between Willbo Investments (Pty) Ltd (Willbo) as seller, and the Department of Rural Development and Land Reform (the department), as purchaser. Both Willbo and the department have laid complaints against the respondent with the Law Society. The complaint by Willbo is subject of a pending judgment before this court. At the hearing of this application, the parties' legal representatives agreed that we should not concern ourselves with the Willbo complaint. Accordingly, we confine ourselves to the complaint by the department.

[5] The department's complaint is that it purchased land from Willbo for R32 000 000 as part of its land redistribution programme. The respondent was appointed as the conveyancer to effect transfer of the property into the name of the community which had successfully claimed the land. In terms of the sale agreement, R28 000 000 was paid into the respondent's trust account with specific instructions to invest the money in an interest-bearing

account in terms of s 78(2A) of the Attorneys Act 53 of 1979 (the Act), to accrue for the benefit of the department, pending the transfer of the property.

[6] On 26 November 2012, and after the transfer had taken place, the department wrote a letter to the respondent requesting the following:

(a) a statement of account reflecting the date of investment of the portion of the purchase price, interest accrued thereon and the date on which the money was withdrawn;

(b) documentary proof of payment of the interest to the department as stipulated in the sale agreement.

[7] The respondent replied to that letter on 28 November 2012, in which he stated that 'the interest on the 90% deposit purchase price 'can be easily calculated with regards to the date of payment to our trust account and to the date of registration. The percentage of interest is stipulated in the Deed of Sale for your ease of reference.' With regard to the payment of interest, the respondent stated that he referred to Mr Bogatsu for the 'terms and conditions between the parties.'

[8] On 7 December 2012 the department wrote to the respondent, in which reference was made of an unanswered letter from the department to the respondent, and giving the respondent 5 days to effect payment of the interest, failing which the department would report the matter to the Law Society. There was no response to that letter, either.

[9] On 11 February 2013 the department wrote another letter to the respondent, again demanding that the respondent account to the department within 14 days. On 15 February 2013 the respondent replied to the department as follows:

> 'Please be so kind and inform us what is the amount that you are claiming as requested telephonically and via correspondence on various occasions. As soon as we receive the amount claimed, we will get instructions and report back to you as possible.'

[10] On 25 February 2013 the department lodged a complaint against the respondent with the Law Society. The department complained that the

respondent had failed to account to it in respect of the interest earned on the purchase price. As a result of this complaint, the Law Society instituted an investigation by a chartered account, Mr De Leeuw Swart (Swart). Swart inspected the respondent's accounting records on 18 and 19 March 2014, and on 4 April 2014, in the presence of the respondent's bookkeeper. In his report to the Law Society, Swart reported, among others, that the respondent's trust accounting records as at 14 October 2013 reflected a trust shortage of R5 322 027.

[11] As to how the respondent dealt with the purchase price, Swart reported that within two weeks of receiving the money, the respondent withdrew R10 000 000 of that money, for his direct and indirect benefit. Before the transfer of the property, the respondent withdrew a further R10 000 000 of the purchase price, and paid it one of the directors of Willbo. It is worth mentioning that the respondent is a shareholder and director of Willbo.

[12] In his answering affidavit, the respondent puts forth as the thrust of his defence, an oral agreement purportedly concluded with a Mr Lengane Bogatsu, a chief director in the department. The agreement, so it is suggested, was that the respondent would retain the interest earned on the investment account as payment for further legal services that the responded would have rendered to the department. With regard to the trust account shortage, the respondent disputes the extent of such shortage.

[13] From the above, three questions can be distilled, albeit arising from the same complaint by the department. First, whether or not the respondent has failed to account to the department for the money entrusted to him for investment. Second, and linked to the first, is whether there was an agreement between the respondent and the department to off-set his fees against the interest earned. Third, whether there was shortage in the respondent's trust account at any given period. The determination of each of these issues is necessary before an enquiry is undertaken on the relief sought by the Law Society. I proceed to consider the questions, in turn.

Failure to account for the money entrusted for investment

[14] It is clear that the respondent conflates two distinct issues- accounting and a set-off. When one talks about an attorney accounting to his client, it means that the attorney should, in writing, inform the client of how the client's funds were disbursed. In the present case, what was called for was simply a statement reflecting the date on which the investment was made, the duration of the investment and the amount of interest earned for the duration for that period. Whether or not there was an agreement of set-off, that exercise must still be undertaken. In other words, set-off has nothing to do with that process of accounting. Put differently, the alleged agreement to set-off the amount supposedly owed by the department, does not relieve the respondent of his duty to account to his trust creditor, the department.

[15] What is more, a set-off cannot take place unless the two amounts to be set-off against each other, are known. In the present case, the respondent has to date, not stated what the amount of interest earned on the investment was. The respondent is content with stating baldly that the amount of his alleged fees exceeds the amount of interest earned on the trust account. The immediate question is: how does he know that if he does not state (or know) what the amount of interest is?

[16] The respondent clearly misconstrues his duties with regard to accounting. This is further demonstrated by his response in the answering affidavit that the letters he sent to the department, referred to in paras [7] [8] and [9] above, constituted accounting to the department. Just to recap on the contents of those letters, the respondent was responding to the department's request for him to account to it and pay over the interest earned on the purchase price. In the first letter, the respondent stated that the interest can be easily calculated, thereby suggesting that the department should calculate the interest. This view is confirmed in his letter dated 15 February 2013 in which he 'enquired' from the department as to the amount of interest it was claiming from him. How the respondent can boldly assert that these responses amount to accounting, is startling, indeed.

[17] What remains is that, to date, the respondent has not informed the department of the particulars of the investment: the date on which the money was deposited in an interest-bearing account in terms of s 78(2A); the amount of interest earned on that account pending the transfer of the property. This should be fairly easy, and should take a simple statement from the bank with all the necessary details such as the duration of the investment and the amount of interest earned on the account for such period.

[18] Nowhere in his answering affidavit does the respondent state for a fact, that the money was invested as instructed. Perhaps the clearest indication that the money was not so invested, lies in the respondent's answer to the pertinent allegation by the department that the money was to be invested in an interest-bearing account. In his answer, the respondent merely states that he 'notes the applicant's contention that the amount ...was to be invested by me in an interest-bearing account ...for the benefit of the department'.

[19] This money was entrusted to him, and he should be able to inform his trust creditor, the department, what he did with the money. The money was either invested or it was not. There is no room for 'noting' such a pertinent allegation, which is the substratum of the complaint against him. It must be dealt with directly and clearly. These are all matters within his peculiar knowledge. It should be borne in mind that Swart reported that within two weeks of the money being paid into the respondent's trust account, the respondent withdrew R10 000 000 thereof for his benefit, and a further R10 000 000 was withdrawn before registration for the benefit of the respondent's co-director at Willbo. These were irregular and unauthorized withdrawals.

[20] The respondent has failed to deal directly and pertinently with these very serious allegations. All he is prepared to say is that Swart was given insufficient information by his then employee, Ms Nel. But he does not say in his answering affidavit what further information he would have given to Swart. Swart noted that because of the two unauthorised withdrawals referred to above, the purchase price would have earned very little interest.

On the above considerations, I am satisfied that the respondent has failed to account to the department with regard to the 90% purchase price.

Agreement to set-off interest against fees

[21] The respondent alleges that there was an oral agreement between him and the chief commissioner of the department in terms of which he was entitled to set-off his fees for additional work he performed for the department, against the interest earned on the purchase price. As proof of the existence of such agreement, the respondent attached to his answering affidavit, a copy of a purported transcript of a conversation that he secretly recorded in a meeting he had with a functionary of the department, Ms Kgomotso Sefolo. Before considering the contents of the transcript, an ethical aspect thereof should be addressed. I find it extremely reprehensible that an attorney secretly recorded a conversation of a meeting with a representative of his client, clearly with the intention of using that in subsequent proceedings. That, in my view, is decidedly unethical, dishonourable and unbecoming of an officer of this court. Most disconcerting, the respondent in fact, puts forth the transcript of such conversation as a basis for his defence. I take a very dim view of the respondent's conduct in this regard.

[22] Back to the contents of the transcript. The respondent's insurmountable difficulty is that he seeks to use some impermissible form of self-corroboration to bolster his assertion of an agreement. How a conversation with anyone other than Mr Bogatsu could confirm the existence of an agreement, escapes me. The conversation was not between him and Mr Bogasu. It is not suggested that Ms Sefolo was party to the alleged agreement between the respondent and Mr Bogatsu, or that she was even aware of it. But in any event, on a plain reading of the transcript, there is nothing remotely indicative of the agreement contended for by the respondent. There is nowhere in the transcript where the respondent refers pertinently to the alleged agreement, or reminds Ms Sefolo of the existence of such agreement.

[23] In my view, therefore, the transcript proves nothing. It confirms nothing. The respondent's assertion in this regard is contrived, and falls to be rejected. It has no probative value whatsoever, and we are entitled to simply ignore it. I therefore find that there was no agreement between the respondent and the department for him to set-off the interest earned on the investment of the purchase price.

[24] If this conclusion is wrong, there is another basis on which the respondent would be non-suited. In terms of s 36(2)(a) read together with s 38(1)(f) of the Public Finance Management Act (PFMA) only the head of the department, as the accounting officer, is empowered to settle all contractual obligations such as the agreement alleged by the respondent. This is public knowledge, and the respondent, as an attorney, is expected to know this. Mr Bogatsu was not the accounting officer of the department. The respondent's reliance on the so-called *Turquand* rule[1] is therefore totally misplaced.

Trust account shortage

[25] I turn now to the allegation that there were trust account shortages. It is not in dispute that there was a deficit in the respondent's trust account. The dispute concerns the extent of that deficit. Swart puts it as high as over R10 000 000. An independent auditor appointed by the respondent indicated a shortage of just over R30 000. The respondent says that he has since paid over this amount into the trust account. Once more, the respondent displays lack of insight into how an attorney's trust account should be maintained. It is not the extent of the trust account deficit that attracts sanction, but the mere existence of trust account deficit. The respondent does not take this court into his confidence as to how this deficit occurred, and the source of the funds he used to repay the shortage.

[1] The rule has its genesis in *Royal British Bank v Turquand* (1856) 6 E&B 327 where the harshness of the constructive notice doctrine was mitigated.

Is the respondent fit to be on the roll of attorneys?

[26] The question whether an attorney is no longer a fit and proper person to practice as such lies, in terms of section 22 (1) (d) of the Act, in the discretion of the court. See *Law Society of the Good Hope v Budricks.*[2] In the present case, it is clear, on a broad conspectus that the respondent has failed to account to the department as to how he dealt with the purchase price entrusted to him with specific instructions to invest. There is direct evidence that he has utilized the bulk of the money entrusted to him, in an unauthorized manner, as more fully explained in para [11] above.

[27] On each of the above, the respondent has failed to come clean before this court and give frank, direct and pertinent answers to the issues raised in the complaint by the department. Instead, the respondent adopted a technical approach to the issues. It must be borne in mind that the proceedings such as the present are *sui generis* and of a disciplinary nature. There is no *lis* between the Law Society and the respondent. The Law Society, as a *custos morum* of the attorneys' profession, places before court facts for consideration and an exercise of a discretion.[3] For that reason, it is expected of a respondent against whom allegations of impropriety are made, to co-operate and provide, where necessary, information, to place the full facts before the Court to enable it to make a correct decision. Broad denials and obstructionism have no place in such proceedings.[4]

[28] Regrettably, in this case, the respondent persisted with a contrived version of an agreement to set-off the interest to be earned on the purchase price. What is more, there was undeniably a trust shortage in his trust account. From the above, I am satisfied that the respondent has shown himself not to be a fit and proper person to be on the roll of attorneys.

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[2] 2003 (2) SA 11 (SCA).

[3] See generally: *Hassim v Incorporated Law Society of Natal* 1977 (2) SA 757 (A) at 767 C-G; *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T) at 393E; *Cirota & Another v Law Society, Transvaal* 1979 (1) SA 172 (A) at 187 H and *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 851E-F.

[4] See *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 851E-F.

The appropriate sanction

[29] Once a court has determined that an attorney is no longer fit to remain on the roll of attorneys, the court must determine an appropriate sanction, namely a suspension from practice or striking from the roll. This determination also lies within the discretion of the court. The opinion or conclusion of the Law Society that a practitioner is no longer a fit and proper person to practise as an attorney carries great weight with the court, although the court is not bound by it: *Kaplan v Incorporated Law Society, Transvaal.*[5]

[30] The application requires a three-stage enquiry. First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is factual enquiry. Second, it must consider whether the person concerned is 'in the discretion of the court' 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 an attorney and, to this extent, is a value judgment. And third, the court must enquire whether in all the circumstances the person in question is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice. See *Law Society, Northern Provinces v Mogami and Others.*[6]

[31] In *Summerley v Law Society, Northern Provinces*[7] the court explained the test to be applied during the third stage of the enquiry as follows:

'The third enquiry again requires the Court to exercise a discretion. At this stage the Court must decide, in the exercise of its discretion, whether the person who has been found not to be a fit and proper person to practice as an attorney deserves the ultimate penalty of being struck from the roll or whether an order of suspension from practice will suffice.'

Conclusion

[32] In my view, the respondent's transgressions are very serious indeed. This is exacerbated by the respondent's apparent lack of insight into the seriousness of his shortcomings, and the fact that he did not take this

[5] 1981 (1) SA 762 (T) at 781H.
[6] [2010] 1 All 315 (SCA) para 14.
[7] [2006] SCA 59 (RSA) para 2

court into his confidence. In my view, the only sanction I deem suitable under the circumstances, is the striking of respondent's name from the roll of attorneys.

Costs

[33] Finally, the issue of costs. In matters such as these, policy considerations are that the Law Society, as the *custos morum* of the attorneys' profession, should not be burdened with legal costs when launching applications against attorneys who have made themselves guilty of dishonourable, unworthy or professional conduct. A practice has therefore developed that costs are granted on an attorney and client scale. We have no reason, and none has been proffered, to depart from that practice. An order of costs on an attorney and client scale is therefore justified.

Order

[34] In the result I make the following order:

1. The name of JOSHUA WILKINSON (the respondent) is struck from the roll of attorneys and of conveyancers of this court.
2. Paragraphs 2 – 12, all inclusive, of the draft order attached hereto and marked "A" are made part of the order of this court.

TM MAKGOKA
JUDGE OF THE HIGH COURT

I agree

M.G. PHATUDI
ACTING JUDGE OF THE HIGH COURT

DATE HEARD : 25 FEBRUARY 2015

JUDGMENT DELIVERED : 20 APRIL 2015

FOR THE APPLICANT : MS. S.L. MAGARDIE

INSTRUCTED BY : DAMONS MAGARDIE RICHARDSON, PRETORIA

FOR THE RESPONDENT : ADV. J.C. SWANEPOEL

INSTRUCTED BY : SPIES BESTER POTGIETER, PRETORIA