

**IN THE COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

12/6/15.

CASE NO: 69558/2014

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES

Applicant

and

MAPUTANA JACOB MAMETSA

Respondent

JUDGMENT

AC BASSON, J

- [1] This is an application in terms of Part B of the Notice of Motion for an order in terms of section 22(1)(d) of the Attorneys Act¹ for the removal of the

¹ Act 53 of 1979.

respondent's name from the roll of attorneys following his urgent suspension from practice as an attorney by order of this court on 14 October 2014.

- [2] According to the records of the Law Society, the respondent was admitted and enrolled as an attorney on 5 December 1978. He practiced as a sole practitioner for his own account under the name and style of MJ Mametsa Attorneys with effect from 8 April 1980 until 28 February 1991. The respondent was also previously suspended from practice as an attorney by order of this court on 12 September 1991 which order was uplifted on 21 September 1993.

- [3] Although the respondent was suspended from practice as an attorney by order of this court dated 14 October 2014, his name is still on the role of attorneys of this court.

- [4] The application in terms of Part A of the Notice of Motion was initially urgent due to the fact that there was *prima facie* proof that the respondent misappropriated trust monies and that the Attorneys Fidelity Fund was at risk.

Applicable principles

- [5] It is trite that applications of this nature are *sui generis* in nature in that it takes the form of a disciplinary enquiry. The Law Society as *custos morum* of the profession merely places such relevant facts before the court in order to place the court in a position to make a decision.² It is also trite that the Law Society has a statutory duty to approach the court.³

- [6] There is a general duty on the respondent to cooperate and provide when necessary all information and to place the full facts before the court to

² *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 893 (T) on 851 F – H.

³ *Law Society of the Northern provinces v RF Sonntag* 2011 ZASCA 204 (25 November 2011).

enable the court to make a correct decision. It is therefore not sufficient to make denials.⁴

- [7] The court will exercise its discretion on a balance of probabilities⁵ and will exercise its discretion having regard to the totality of facts placed before it. It is trite that the views of the Law Society that a practitioner is no longer a fit and proper person to practice as an attorney carry great weight with the court although the court is not bound by such an opinion.⁶ The question whether an attorney is no longer fit and proper person to practice derives from section 22(1)(d) of the Attorneys Act and is dependent upon factual findings but lies in the discretion of this court.⁷ The discretion of the Court must therefore be based upon the facts before it and must be proven on a balance of probabilities.⁸
- [8] One of the important principles enshrined in the Attorneys Act is the principle that trust money does not form part of the assets of an attorney. It is furthermore trite that the unjustifiable handling of trust monies is untenable and undermines the principle that the trust account is completely safe in respect of money held therein by an attorney on behalf of another person. Furthermore, an attorney is a member of a learned, respected and honourable profession and, by entering it, he/she pledges himself/herself with total and unquestionable integrity to society at large, to the court and to the profession. The law therefore expects from an attorney *uberrima fides* -

⁴ *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 893 (T) on 853 G –H.

⁵ *Ibid* at 853 I – J: "Hoewel die beantwoording van die vraag of die respondent 'n geskikte gepaste persoon is om op die rol van prokureurs te bly ingevolge art 22(1)(d) van die Wet op Prokureurs die uitoefening van 'n diskresie deur hierdie Hof behels, moet die feite aan die hand waarvan die diskresie uitgeoefen word, nogtans vas staan...Die beoordeling van die feite geskied aan die hand van die gewone sivilregtelike maatstaf van bewys, naamlik op 'n oorwig van waarskynlikhede..."

⁶ *Kaplan v incorporated Law Society Transvaal* 1981(2) SA 762 (T) at 781H: "There is noneed to formulate any specific charges against him... Because of the special position occupied by a Law Society in relation to the profession, its views as to whether or not an applicant is a fit and proper person are entitled to great weight but the Court is in no way bound by them."

⁷ *Law Society of the Cape of Good Hope v C* 1986 (1) SA 616 (A).

⁸ *Law Society Transvaal v Matthews* 1989 (4) SA 389 (T) at 393 I – J.

which is the highest possible degree of good faith - in his/her dealings with his/her clients.

- [9] In this regard we can do no better than to refer to the following extract from a decision of this Court in *The Law Society of The Northern Provinces v Mantsha*⁹ where the Court summarized the general principles applicable to the attorney's profession as follows:

"[31] Before considering the established misconduct it would be useful to review the relevant general principles concerning an attorney, his profession and the conduct of his profession. These are set out by the President of the applicant in its founding affidavit. None of them is disputed by the respondent:

(1) The profession is not a mere calling or occupation by which a person earns his living. An attorney is a member of a learned, respected and honourable profession, and, by entering, he pledges himself with total and unquestionable integrity to society at large, the courts and to the profession. Only the very highest standard of conduct and repute and good faith are consistent with membership of the profession which can only function effectively if it inspires the unconditional confidence and trust of the public. The image and standard of the profession are judged by the conduct and reputation of all of its members and, to maintain this confidence and trust, all members of the profession must exhibit the qualities referred to at all times;

(2) It is required of an attorney that he observe scrupulously and comply with the provisions of the Attorneys Act and the rules;

(3) It is of particular importance that an attorney complies with the provisions of the Attorneys Act and the rules in relation to the money of the client which is placed into its custody and control. **Such money, generally known as trust money, does not form part of the assets of an attorney.**¹⁰ The very essence of a trust fund is the absence of risk and the confidence created thereby. The Law Society has always adopted the view that there can be no excuse for an attorney not to comply with each and every one of the requirements which directly or indirectly relate to trust money. The unjustifiable handling of trust money is totally untenable and not only frustrates the legal requirements relating

⁹ 2007 JDR 0646 (T).

¹⁰ Court's emphasis.

to trust money but also undermines the principle that a trust account is completely safe in respect of money held therein by an attorney on behalf of another person;

(4) The law exacts from an attorney *uberrima fides* - the highest possible degree of good faith - in his dealings with his client, that implies that at all times his submissions and representations to his client must be accurate, honest and frank;

(5) In pecuniary matters the attorney must be most punctual and diligent. He must not retain money belonging to his client longer than is absolutely necessary and must account to his client for monies received by him in a proper and diligent manner;

(6) An attorney must not appropriate for his own use monies received on behalf of a client for whom he is acting, without the permission or authority of the client to do so;

(7) An attorney must never abuse the position of trust and the fiduciary relationship that should exist between an attorney and his client."

See also *Law Society, Transvaal v Matthews*:¹¹

"I deal now with the duty of an attorney in regard to trust money. Section 78(1) of the Attorneys Act obliges an attorney to maintain a separate trust account and to deposit therein money held or received by him on account of any person. Where trust money is paid to an attorney it is his duty to keep it in his possession and to use it for no other purpose than that of the trust. It is inherent in such a trust that the attorney should at all times have available liquid funds in an equivalent amount. The very essence of a trust is the absence of risk. It is imperative that trust money in the possession of an attorney should be available to his client the instant it becomes payable. Trust money is generally payable before and not after demand. See *Incorporated Law Society, Transvaal v Visse and Others*; *Incorporated Law Society, Transvaal v Viljoen* 1958 (4) SA 115 (T) at 118F - H. An attorney's duty in regard to the preservation of trust money is a fundamental, positive and

¹¹ 1989 (4) SA 389 (T)

unqualified duty. Thus neither negligence nor wilfulness is an element of a breach of such duty: *Incorporated Law Society, Transvaal v Behrman* 1977 (1) SA 904 (T) at 905H. It is significant that in terms of s 83(13) of the Attorneys Act a practitioner who contravenes the provisions relating to his trust account and investment of trust money will be guilty of unprofessional conduct and be liable to be struck off the roll or suspended from practice."

- [10] Various complaints were lodged against the respondent in this matter. The following two are of particular importance.

Mr Radebe

- [11] In the affidavit on behalf of the Law Society, reference is made to the complaint submitted against the respondent by a certain Mr Radebe. During May 2012 the claim of Mr Radebe against the RAF was settled for an amount of R1.7 million. This amount was paid into the trust account of MJ Mametsa Incorporated. According to the complainant the respondent overcharged him in that the respondent retained 40% of the settlement amount instead of the 25% as agreed to between the parties.
- [12] The respondent initially failed to answer to the complaint against him. The respondent then tried to explain that he set-off a bad debt against the money received from the RAF and that this was conveyed to the complainant orally. What makes this explanation difficult to accept is the fact that the alleged bad debt related to a 2003 divorce matter and the fact that the respondent only forwarded the letter of demand in respect of these outstanding fees on 27 November 2013. More importantly, the complainant had never signed any consent for set-off to apply.
- [13] We are in agreement with the submission that the respondent should have at least issued summons in respect of the money allegedly owed to him for the period 2001 to 2010 in order to prevent prescription of the claims. This was not done. In any event, apart from the fact that the debt had prescribed, the respondent had written of the debt as a bad debt.

- [14] We are further in agreement that in terms of the Power of Attorney signed by the complainant, the respondent would have been entitled to a fee of the scale as between attorney and client as well as 40% of the amount received from the RAF. This clearly amounts to a contravention of Rule 89.24. The law regarding contingency fee agreements has been dealt with extensively in various cases and ought to have been clear to the respondent.¹²

MJ Mametsa Incorporated

- [15] A further complaint relates to the manner in which the respondent conducted himself in respect of the trust account of the firm MJ Mametsa.
- [16] The firm MJ Mametsa Incorporated closed down on 1 August 2006. The closing audit report for the period ending 17 August 2006 was submitted to the applicant on 1 September 2006. The balance in the trust account was set to be transferred to the trust account of the firm Van Deventer Mojabelo Incorporated Attorneys. The latter firm conducts its business from the same premises as MJ Mametsa and it appears that the respondent is the only practitioner at the firm's Boksburg branch office.
- [17] It is important to point out that the respondent continued to conduct business under the name and style of MJ Mametsa Incorporated and that the said firm's trust account remained active and utilised by the respondent despite the fact that the firm had closed down during 2006 already and despite the fact that the closing audit report was submitted to the applicant
- [18] It is further important to point out that the respondent confirmed that no accounting records were kept in respect of the trust account of the firm MJ Mametsa Incorporated since the submission of the closing audit to the applicant on 1 September 2006. Notwithstanding the fact that the account was closed down, an amount of R1.7 million was paid into the trust account

¹² See *inter alia*: *Mnisi v RAF* [2010] JOL 25857 (GNP).

of the firm MJ Mametsa Incorporated by the RAF. On 22 May 2012 an amount of R1 021 665.20 was transferred into the respondent's personal bank account. It appears that this amount represents the total amount credited to the complainant (Mr Radebe). Compounding matters is the fact that this amount was paid to the complainant from the respondent's personal bank account.

- [19] On 22 May 2012 a further amount of R681 110.14 was transferred into another bank account of the respondent. According to the respondent this amount represents the fee that he was entitled to in terms of the fee agreement with the complainant.
- [20] On 8 November 2012 a further amount of R215 279.82 was paid into the firms trust account in respect of fees received from the RAF. On 9 November 2012 an amount of R214 000.00 was transferred into the respondents personal bank account.
- [21] Apart from the fact that the respondent continued to use a trust account long after it was closed, the respondent also kept no accounting records since the closure of the firm on 1 August 2006 and no audit report was submitted to the applicant.
- [22] Ms Geringer who investigated the matter on behalf of the Law Society also found that the respondent had received approximately 29 payments from the RAF into the trust account of MJ Mametse Incorporated totalling an amount of R3 155 950.71. Further payments totalling R223 862.64 were also received in the trust account of MJ Mametse. A total amount of R1 718 444.23 was transferred from the trust account for the personal benefit of the respondent. What is clear from the report of Geringer is the fact that the transactions were not limited to the RAF matter of Radebe. There were numerous transactions involving various other entities. In many instances the payee is unknown. The explanation by the respondent that he merely used the account to collect amounts owed on already open matters cannot be accepted.

- [23] It is clear from the facts that were placed before the court that the respondent has, *inter alia*, contravened various provisions of the Attorneys Act and the applicant's Rules: (i) No accounting records were kept for transactions in the trust account after the closure of the firm (Section 78(4) read with Rule 68.1); (ii) Trust money was transferred to the respondent's personal account from where his client was paid (Rule 68.6.1); (iii) On various dates the trust account had a debit balance (Rule 69.3); (iv) Withdrawals from the trust account was not only made to, for or on behalf of the trust creditor or transfers to the business account (Rule 69.5); (v) The respondent failed to submit accountancy records in respect of the trust account for the firm from 2006 to date (Rule 70.3 and 70.4). (vi) Lastly, the respondent overreached his client (Rule 89.24).
- [24] The respondent was an attorney of 18 years' standing. Any explanation that he did not know that he could not utilise the trust account after the closing of his firm cannot therefore be accepted. There is also no excuse for the fact that the respondent had failed to keep any accounting records after the trust account was closed.¹³ It is also clear from the papers that the respondent did not give any cooperation to the curator. In fact, it would appear from the papers that the respondent misrepresented the whereabouts of his firm's records to the curator.
- [25] In respect of Mr Radebe's complaint it is instructive that the respondent admits liability for his infractions.
- [26] The transgressions are serious and took place over a substantial period of time. The respondent operated his trust account for seven years after the account of his firm was closed. The fact that he did not submit records of the

¹³ *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T) at 395D - F: "The particulars and information of trust moneys must therefore be contained in the narrative of the entries of the books of account and it should not be necessary to resort to documents and files to obtain such particulars and information."

Failure to keep proper books of account is a serious contravention and renders an attorney liable to be struck off the roll of practitioners or liable to suspension; and the Courts have repeatedly warned practitioners of the seriousness of such a contravention."

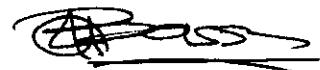
firm's account until 2013 is aggravating. The respondent is a long standing member of the applicant and ought to have known that his conduct is unbecoming. Furthermore, Mr Radebe has no doubt been prejudiced and he is owed money by the respondent. Although the respondent has tried to procure the funds to pay Mr Radebe the fact remains that he has not yet repaid the monies owed to Mr Radebe.

[27] In conclusion: It is clear from the papers that the respondent has contravened various Rules of the applicant and the provisions of the Attorneys Act. Taking into account the respondents infractions, it is clear that his conduct is indeed dishonourable, unprofessional and unworthy of a practitioner. His conduct constitutes a material deviation from the standards of professional conduct which is expected of a practitioner.

[28] We are therefore of the view that a proper case has been made out for the relief sought.

[29] Order:

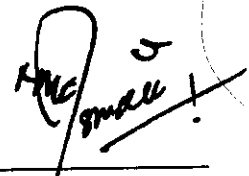
The Draft Order attached hereto as Annexure A is made an order of Court.



AC BASSON

JUDGE OF THE HIGH COURT

I agree,



M ISMAIL J

JUDGE OF THE HIGH COURT