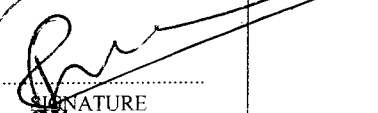


IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

24/07/2013

Case No: 10881/2011

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHERS JUDGES: YES /NO
(3)	REVISED ✓
23/7/2013	
DATE	SIGNATURE

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES

APPLICANT

(Incorporated as the Law Society of the Transvaal)

and

SELLO NKURAHMAN MOIMA

FIRST RESPONDENT

and

MOIMA INCORPORATED

SECOND

RESPONDENT

CORAM: EBERSOHN ET CHETTY AJJ

DATE HEARD 14th JUNE 2013

DATE JUDGMENT HANDED DOWN:

July 2013

JUDGMENT

EBERSOHN AJ

[1] The Law Society of the Northern Provinces (hereinafter referred to as “the Law Society”) is applying for the name of Sello Nkurahmah Moima (hereinafter referred to as “the First

Respondent”) to be struck from the roll of practising attorneys.

[2] 2.1 The First Respondent Sello Nkurahmak was admitted as an attorney of this Court on 5 May 1992 and his name is still on the roll.

2.2 The First Respondent is currently practising as an attorney of this Court for his own account and as a single practitioner under the name and style of Moima Incorporated (the second Respondent) at First Floor, Masada Building, Corner of Proes and Paul Kruger Street, Pretoria, Gauteng.

[3] The Law Society presented facts to this Court which the Law Society contends constitute such a deviation from the standards of professional conduct that the First Respondent is not a fit and proper person to continue to practice as an attorney and which will justify the Court in ordering that the First Respondent’s name be struck from the roll of attorneys.

[4] 4.1 It is trite law that applications such as this one, are *sui generis* and of a disciplinary nature. There is no *lis* between the Law Society and the Respondents. The Law Society, as *curator morum* (genitive singular) of the profession, places facts before the Court for consideration.

Vide: 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) as 393 E.

Cirota & Another v Law Society, Transvaal, 1979(1) SA 172(A) on 187 H.

Prokureursorde van Transvaal v Kleynhans, 1995(1) SA 839(T) on 851 E – F.

- 4.2 The question whether an attorney is a fit and proper person in terms of Section 22(1)(d) of the Act is not dependent upon a factual finding, but lies in the discretion of the Court.

Vide: Law Society of the Cape of Good Hope v C, 1986(1) SA 616(A) at 637 C – E.

A v Law Society of the Cape of Good Hope, 1989(1) SA 849(A) at 851 A – E.

Law Society, Transvaal v Mathews, *supra* at 393 I – J.

- 4.3 In exercising its discretion, the Court is faced with a three stage inquiry:

- (a) The first inquiry is for the Court to decide whether or not the alleged offending conduct has been established on a preponderance of probabilities;
- (b) The second inquiry is whether, as stated in Section 22(1)(d) of the Act, the practitioner concerned “in the discretion of the Court” is not a fit and proper person to continue to practice. This entails a value judgment;
- (c) The third inquiry is whether in all the circumstances, the practitioner in question is to be removed from the roll of attorneys or whether an order suspending him from practice for a specified period will suffice. Ultimately this is a question of degree.

Vide: Jasat v Natal Law Society, 2000(3) SA 44 (SCA) at 51 B – I.

Law Society of the Cape of Good Hope v Budricks, 2003(2) SA11

(SCA) on 13E – 14.

- 4.4 The Court's discretion must be based upon the facts placed before it and facts in question must be proven upon a balance of probabilities.

Vide: Law Society, Transvaal v Matthews, *supra* at 393 I – J.
 Olivier v Die Kaapse Balie-Raad 1972(3) SA 485(A) at 496 F – G.
 Summerley v Law Society, Northern Provinces, 2006(5) SA 613
 (SCA) at 615 B – F.

- 4.5 The facts upon which the Court's discretion is based should be considered in their totality. The Court must not consider each issue in isolation.

Vide: Law Society, Transvaal v Matthews, *supra* at 420 B – D.
 Law Society, Cape of Good Hope v Segall, 1975(1) SA 95C at 99B.
 Beyers v Pretoria Balie Raad, 1966(2) SA 593 (A) at 606B.
 Malan and another v The Law Society, Northern Provinces [2009] 1
 All SA 133 (SCA).

- 4.6 The following case law reflects the attitude of the Courts in respect of attorneys not keeping proper accounting records:

Vide: Malan and another v The Law Society, Northern Provinces [2009] 1
 All SA 133 (SCA)
 Law Society of the Northern Provinces v Morkel [2003] FOL 10868
 (T)
 Botha & Others v The Law Society of the Northern Province [2009]

3 All SA 293 (SCA)

Law Society of the Northern Provinces v Setshogoe [2009] JOL
2307 (T)

[5] The facts and circumstances which prompted the Law Society to bring this application to the Court include the following:

- a) There is and has been a substantial trust deficit in the First Respondent's bookkeeping;
- b) The First Respondent delayed the payment of trust funds;
- c) The First Respondent failed to account to a client in respect of trust funds;
- d) The First Respondent failed to co-operate with the Law Society and to hand the firm's accounting records to the Law Society for purposes of an inspection thereof;
- e) The First Respondent contravened several provisions of the Attorneys' Act and the Law Society's Rules relating to bookkeeping of an attorney; and
- f) The Law Society received complaints against the First Respondent.

[6] 6.1 This application was issued during February 2011 and brought before this Court on an urgent basis. It was served on the respondents on 17 February 2011 and was set-down for 08 March 2011.

- 6.2 The respondents served an opposing affidavit on 04 March 2011. On 8 March 2011 the application was postponed *sine die*.
- 6.3 The Law Society filed its replying affidavit on 29 September 2011 i.e. six months later and a further supplementary founding affidavit in April 2012 i.e. seven months later.
- 6.4 In the supplementary founding affidavit particulars of more complaints against the respondents were raised. In the further papers filed more complaints were raised. For purposes of this judgment it is, however, only necessary to refer to and to deal with one complaint and the flaws in the Respondents' bookkeeping and the deficit in his trust account.
- 6.5 The matter was set down for hearing on the 24th August 2012 and on that same date the respondents filed their supplementary answering affidavits to the Law Society's supplementary founding affidavits.
- 6.6 On that day the matter was argued and the first respondent raised what problems he had and the Court made the following order:
- "1. That the application for the suspension of the first respondent from practice as an attorney, alternatively for the striking off of the first respondent's name from the roll of attorneys of this Honourable Court, be postponed *sine die*;
 2. That the first respondent is to provide the outstanding accounting records, if any, including the business accounting records, to the applicant within 30 (thirty) days from the date of this order;

3. That the applicant is to prepare a final written audit report within 30 (thirty) days from the date of this order;
4. That the first respondent is to serve and file his accountant's report within 30 (thirty) days of receipt of the report as referred to in paragraph 3 above;
5. That the applicant may thereafter set the matter down for hearing in accordance with the Rules of this Court;
6. That costs be reserved."

6.7 The supplementary founding affidavit that was filed by the Law Society in April 2012 was clearly necessitated by additional complaints against the respondents which had to be brought to the attention of this Court. Furthermore, the audit by the Law Society which was sanctioned by this Court in its order of 24 August 2012 was conducted after receiving the accounting records from the First Respondent and was placed before the Court by a supplementary founding affidavit dated 29 January 2012. The actual report appears on pages 676 (a) to 691 of the paginated bundle.

6.8 The Law Society proceeded with the application for the removal of the name of the first respondent from the roll of practising attorneys. The court now deals with the merits of the application.

[7] 7.1 After the Law Society had received a complaint against the First Respondent to the effect that the first respondent delayed the payment of trust funds and failed to account in respect of trust funds, the Law Society instructed an internal auditor in

the employ of the Law Society's Monitoring Unit, one Ms Phossina Mapfumo (Mapfumo), to investigate the complaint and to conduct an inspection of the First Respondent's accounting records. Mapfumo completed her mandate and reported to the Law Society in writing on 6 December 2010.

7.2 According to her report Mapfumo could not inspect the accounting records of the First Respondent due to the First Respondent's failure to co-operate with Mapfumo or her principal, the Law Society. The efforts of Mapfumo and attendances in trying to obtain and inspect the First Respondents' accounting records are recorded in Mapfumo's report.

7.3 What is pertinent in the report is the fact that the First Respondent had failed to co-operate, he made undertakings which he failed to honour, and that the Second Respondent did not retain its accounting records at its main office. This is a contravention of Rule 68.4.2.

7.4 Mapfumo also discussed a complaint received by the Law Society dated 29 July 2010 from Werner Prinsloo Attorneys (attorney Prinsloo) on behalf of Mr M.J. Maela and Mr M.P. Marema, the current trustees of the Mirror Development Projects Trust (Mirror Trust). The facts of the complaint are set out in page 69 and 70 of Mapfumo's report and may be summarised as follows:

7.4.1 Attorney Prinsloo acted on behalf of the abovementioned trustees. Mirror Trust entered into a written agreement with Mr D Van Hengel for the purchase of an immovable property located in Leeufontein. Attorney Prinsloo was appointed as the conveyancing attorney.

- 7.4.2 A deposit in the amount of R350 000.00 was paid and an undertaking was given to deliver guarantees and/or to pay the balance of the purchase price at an agreed date.
- 7.4.3 Mirror Trust was initially represented by Mr P Botha of Weyer & Weyer attorneys. Botha received and invested the monies on behalf of Mirror Trust.
- 7.4.4 During the period September 2009 to October 2009 a trustee of Mirror Trust, the late Mr Frans Latekgoma, instructed Weyer & Weyer attorneys to transfer the available funds to the First Respondent. The First Respondent was instructed to in future represent Mirror Trust.
- 7.4.5 Weyer & Weyer attorneys transferred an amount of R978 700.00 into the First Respondent's trust account (Mapfumo's report incorrectly refers to R984 700.00. See page 177, paragraph 5.30 of the record).
- 7.4.6 On 15 October 2009 the late Frans Latekgoma instructed the First Respondent to transfer the amount received from Weyer & Weyer attorneys together with the interest earned thereon to the trust account of attorney Prinsloo. He also instructed attorney Prinsloo to invest the monies in an interest bearing account pending the transfer of the property and the registration thereof in the name of Mirror Trust.

- 7.4.7 The First Respondent on 2 November 2009 deposited a cheque in the amount of R400 000.00 into attorney Prinsloo's trust banking account.
- 7.4.8 The First Respondent's trust cheque was, however, dishonoured by his bank (the First Respondent explained the reason for the dishonoured cheque in page 106 to 107 of the answering affidavit, paragraph 6.6., and he attached a letter from the bank which letter merely states that failure to pay the cheque was due to no fault of the Second Respondent). The Respondents did not attach a copy of the bank statement reflecting the balance in the account during the time in question to disprove any suspicion of a trust shortage.
- 7.4.9 Thereafter, on 6 November 2009, the First Respondent transferred the amount of R400 000.00 to attorney Prinsloo's trust banking account electronically.
- 7.4.10 The First Respondent failed to make further payments to attorney Prinsloo, despite several requests that he should do so.
- 7.4.11 On 8 January 2010 attorney Prinsloo addressed a letter to the First Respondent and requested him to transfer the balance of the funds in accordance with his instructions from Mirror Trust.
- 7.4.12 During a telephone conversation between attorney Prinsloo and the First Respondent, the First Respondent mentioned that an amount

of approximately R600 000.00 was still to be transferred.

- 7.4.13 The First Respondent failed to make any further payments or transfers.
- 7.4.14 During a meeting held on 18 February 2010 the trustees confirmed their instructions to the First Respondent to transfer the balance of the funds held in his trust banking account to attorney Prinsloo.
- 7.4.15 The First Respondent refused and/or neglected to effect any further payments or transfers. Attorney Prinsloo was on 9 June 2010 instructed to address a letter to the First Respondent, demanding payment of the total amount held by him in order to effect the transfer of the immovable property.
- 7.4.16 The First Respondent persisted in his failure to make further payments. After having provided several verbal undertakings in this regard, the First Respondent eventually transferred an amount of R100 000.00 to attorney Prinsloo's trust banking account on 18 June 2010.
- 7.4.17 Since the transfer of 18 June 2010 referred to above the First Respondent has failed and/or refused to accept telephone calls from attorney Prinsloo and to reply to his messages.
- 7.4.18 The First Respondent subsequently undertook to transfer the balance of the funds to attorney Prinsloo on or before Wednesday,

21 July 2010. He failed to honour his undertaking.

7.4.19 On 27 July 2010 attorney Prinsloo , however, received a trust cheque for a further amount of R100 000.00 from the First Respondent. The First Respondent's trust cheque was however dishonoured by his bank.

7.4.20 Attorney Prinsloo has to date received only an amount of R600 000.00. An amount of R378 700.00 plus interest earned on this amount remains outstanding.

7.5 Mapfumo discussed the complaint with the First Respondent. The First Respondent advised Mapfumo that he had opened a separate trust banking account at Standard Bank for purposes of the funds in the Mirror Trust transaction. His main trust bank account was kept at Nedbank. He admitted to having received the funds from Weyer & Weyer attorneys. He was however uncertain as to the exact amount he received from Weyer & Weyer attorneys. He ascribed his uncertainty to the fact that his file and bank statements were in possession of his auditors.

7.6 The First Respondent furthermore admitted that there were no funds available on the account. He alleged that he had received instructions from the trustees to pay other parties from the funds. The First Respondent did not present Mapfumo with any proof in respect of this allegation. These allegations are repeated in the answering affidavit. However, they are denied by the trustees.

7.7 Mapfumo was unable to inspect the accounting records relating to the transaction.

She was therefore unable to establish why the First Respondent had failed to pay the transferring attorneys the balance of the funds as agreed. She was also unable to establish why the First Respondent paid certain amounts in instalments to attorney Prinsloo, whilst the total of the trust funds should have been available in his trust banking account at all times.

7.8 The First Respondent has therefore failed to account and to pay trust funds within a reasonable time.

7.9 The First Respondent submitted his Rule 70 auditor's report for the period ending 28 February 2010 to the Law Society only on the 12 August 2010.

7.10 In paragraph 7.7 of the auditor's report the Law Society was informed that the First Respondent held an amount of R52 893.50 in his trust banking account and that the firm's trust creditors amounted to R52 893.50 whilst in actual fact this report was incorrect as the deficit in the trust account was considerably higher.

7.11 The firm's auditors therefore, for unknown reasons which the Law Society is to follow up with the auditors, did not report any trust deficit to the Law Society. As at 28 February 2010 an amount of R584 700.00 was however still owing to the complainant referred to above. There was therefore a trust deficit in the First Respondent's trust bank account and the Respondents' auditors' certificate was not correct and should have read that there was a trust shortage. It is clear that wrong information was given to the Respondents' auditors with the intent to mislead the Law Society. The deficit evidences a contravention by the First Respondent of the provisions of Section 78(1) of the Act, read with Rule 69.3.1 of the Law Society's Rules. In paragraphs 7.4.5, 7.4.9 and 7.10 *supra* the actual

deficit as at the date in question were set out. As at 28 February 2010 the first respondent had only refunded an amount of R400 000.00 to the complainant leaving a considerable balance owing which apparently had disappeared from the First Respondent's trust bank account.

7.12 Mapfumo obtained a certificate regarding the balance of the trust banking account of the Respondents held at Nedbank.

7.13 Mapfumo was, however, unable to obtain a certificate of balance in respect of the First Respondent's trust banking account held at Standard Bank.

7.14 According to the certificate of balance obtained from Nedbank the First Respondent held an amount of R32 793.53 in his trust banking account as at 23 November 2010.

7.15 Based on the complaint referred to above and the first respondent's indications that the Standard Bank trust account had no funds, the First Respondent did not have sufficient funds available in his Standard Bank trust banking account. There was therefore a trust deficit in the firm's bookkeeping if the Nedbank trust account is considered.

REPORT AUDITOR VINCENT FARIS

7.17 After Mapfumo's investigations the Law Society instructed a chartered accountant, Mr Vincent Faris (Faris), to investigate the matter and the allegations contained in the first respondent's answering affidavit.

7.18 Faris was unable to conduct a proper inspection of the firm's accounting records

due to the fact that the records presented to him were incomplete, unreliable and inaccurate. The accounting records presented to Faris were in arrears, there were no justifications for payments and there was an improper movement of funds between the trust account, trust investment account and business banking account.

7.19 From the available records Faris could establish at least two trust deficits if the following positions are accepted and there appears to be no reason why it should not be accepted:

7.19.1 If it is accepted that there is a trust liability in the matter of Mirror Development Trust, the trust deficit as at 31 December 2010 is the amount of R397 585.99.

7.19.2 If it is accepted that there is no trust liability to Mirror Development Trust, there is in any event a trust deficit in the amount of R3 583.98 comprising of trust account interest due to the Law Society.

7.20 It was the case of the Law Society that there is a trust liability to Mirror Development Trust as the First Respondent has failed to prove otherwise and the trustees of Mirror Development Trust are denying the First Respondent's allegations and support the complaint.

7.21 Faris has revealed further contraventions by the First Respondent which are contained in his report and is referred to in the Law Society's replying affidavit (pages 170-176 of the record) as follows:

"5.8 Faris contacted the first respondent on 29 March 2011 and scheduled his

inspection for 8 April 2011. Prior to 8 April 2011 the first respondent contacted Faris and advised him that it would not be possible to meet with him on the agreed date.

5.9 After Faris made several telephone calls to the first respondent, he subsequently undertook to make his accounting records available to Faris on 26 April 2011.

5.10 Faris attended at the firm on 26 April 2011. The first respondent was not present.

5.11 Faris subsequently directed a written enquiry at the first respondent as to the availability of his business accounting records. The first respondent failed to reply thereto.

Nature of investigation and Faris' approach

5.12 Faris directed his inspection at a review of the first respondent's trust accounting and supporting financial records, subsidiary source books and documents, operating and administrative systems and procedures and the state thereof in order to express an opinion on the following:

5.12.1 whether the first respondent has complied with the provisions of the Attorneys' Act;

5.12.2 whether the first respondent has complied with the provisions of Rules 68, 69 and 70 of the Law Society's Rules; and

5.12.3 the existence of any contraventions and/or irregularities and the identification and disclosure thereof.

5.13 Only limited accounting records were made available to Faris for purposes of his inspection. He was therefore unable to perform the procedures which he would normally perform during an investigation. The scope of his investigation was accordingly limited.

5.14 Faris directed his inspection at the period June 2009 up to the last date to which the accounting records had been written up, being 31 December 2010.

Accounting and supporting records and the state thereof

Introduction

5.15 Faris was presented with the firm's receipt book, two blue soft cover files and one yellow lever arch file. The business accounting records were not made available to Faris.

Trust banking account and cash book

5.16 The first respondent conducted his trust banking account at Standard Bank. On 31 December 2010 there was an amount of R315.14 available in the account.

5.17 Bank statements covering the period from the opening of the account on

25 June 2009 (with a deposit of R500.00) up to December 2010 were made available to Faris. These statements were contained in one of the blue soft cover files referred to above. The file was described as *Standard Bank Trust Account* on the outside cover. There was also a computer generated cash book in the file which was written up, totalled and balanced up until 31 December 2010.

Trust Investment Account and Cash Book

- 5.18 The second soft cover file contained bank statement of another Standard Bank account, described as *Investment Account* on the outer cover. The account was styled in the same manner as referred to above, but it did not contain any indication that it was in fact a trust account. It did not contain a reference to Section 78 (2A) of the Attorneys' Act either.
- 5.19 The bank statements covered the period from the opening thereof on 13 August 2009 up until 31 December 2010. It was opened with a deposit in the amount of R500 000.00 which was made from the trust banking account. On 31 December 2010 there was an amount of R1 051.26 available in the account. A cash book was also included in the file.
- 5.20 Faris found that there was no annotation on the bank statements to indicate that the account was opened in terms of Section 78 (2A) of the Attorneys' Act. The statements did not contain an annotation to the effect that it was a trust account either.

5.21

Receipt book

- 5.21 Faris found that the first respondent did not issue receipts in a chronological order.

Trust interest and bank charges

- 5.22 Faris examined the firm's bank statements and found that bank charges were debited directly against the firm's trust banking account. In many instances the bank charges exceeded the trust interest.
- 5.23 The accumulated interest due to the Law Society for the period June 2009 to December 2010, after the deduction of bank charges amounted to R3 690.16. This is reflected on the first page of annexure D to Faris' report. (Faris incorrectly refers to it as annexure E)
- 5.24 Faris' inspection revealed that the first respondent failed to account to the Law Society in terms of Section 78 (3) of the Attorneys' Act for interest earned on his trust banking account.
- 5.25 There were insufficient funds available in the first respondent's trust banking account on 31 December 2010 in order to cover the amount due to the Law Society, being R3 690.16.
- 5.26 There was therefore as at 31 December 2010 a trust deficit in the amount of R3 059.88 on this account alone.

5.27 There were also trust deficits at the month ends September 2010, October 2010 and November 2010 in respect of this account alone.”

7.22 The First Respondent has subsequently delivered certain accounting records to the Law Society which records were forwarded to Faris for further inspection. Faris reported further in short that there was no reason to vary or change his initial report as the accounting records did not assist as they remained incomplete and unreliable.

[8] The Law Society received additional complaints against the First Respondent which complaints are summarised in the Law Society’s supplementary founding affidavit. In terms of the complaints the first respondent appears to have failed to execute his instructions properly in contravention of Rule 89.15 and 89.30 of the Law Society’s Rules. It is, however, not necessary for purposes of this judgment to deal therewith herein.

COMPLAINTS HERMAN MONAGENG MOKGATLE AND DR. H. KONIG

[9] Mokgatle instructed the first respondent to institute a third party claim against the Road Accident Fund in 1996. The matter has still not been finalised. He referred to the matter as never-ending. He also complained that the first respondent did not reply to his communications and that he failed to provide Mokgatle with a progress report.

9.1 The respondents replied that summons has been issued against the Road Accident Fund and the reports from doctors were obtained regarding the injuries to Mokgatle’s eyes sustained during two separate incidents, the present one handled by the respondents and a previous one and that the doctors were allegedly uncertain as to which injuries were caused during which incident.

- 9.2 The respondents stated that they were attempting to settle the matter with the Road Accident Fund.
- 9.3 On p. 774 etc. of the record there is a copy of the summons issued against the Road Accident Fund already in 2001. It is now 12 years later.
- 9.4 Dr. Harold Konig also complained in writing about the conduct of the respondents in the Mokgatle matter. He examined Mr. Mokgatle in 2007 and wrote a report. Thereafter the respondents got him to release the report against their promise that as soon as the case has been settled they would settle his account which has not happened to date. It is unacceptable that the summons was issued in 2001 and the eye specialist only consulted in 2007. It seems to indicate that the summons was issued before the case was properly and timeously attended to so that a proper summons could be issued. Dr. Konig is now waiting for his fees 6 years. It is improper and unprofessional to have a doctor wait so many years for his fees.
- 9.5 It is now 16 years after the First Respondent was instructed in the matter. It must therefore be concluded that the matter did not receive proper attention and the respondents made themselves guilty of improper, negligent and unprofessional conduct.

PREVIOUS DISCIPLINARY PROCEEDINGS

- [10] The Law Society has previously disciplined the First Respondent after finding him guilty of offences which can be summarized as follows:

- 10.1 The First Respondent failed to pay his subscription fees in respect of the Law Society for the years 2003, 2004 and 2005;

- 10.2 The First Respondent failed to submit his Rule 70 auditor's report for the period ending 29 February 2004 to the Law Society. The report had to be submitted to the Law Society on or before 21 August 2004. The First Respondent's failure is a contravention of the provisions of Rule 70 and amounts to unprofessional, dishonourable and unworthy conduct;
- 10.3 The First Respondent practised as an attorney without being in possession of a fidelity fund certificate during 2003, in contravention of the provisions of Section 41(1) and 41(2) of the Attorneys' Act;
- 10.4 The First Respondent failed to submit his Rule 70 auditor's report for the period ending 28 February 2005 to the Law Society. The report had to be submitted to the Law Society on or before 31 August 2005;
- 10.5 The First Respondent failed to submit his Rule 70 auditor's report for the period ending 28 February 2006 to the Law Society. This report had to be submitted to the Law Society on or before 31 August 2006;
- 10.6 The First Respondent failed to honour an undertaking given to a legal official in the employ of the Law Society's Monitoring Unit, Ms M Geringer, to report back to her after having had a discussion with his auditors;

- 10.7 The First Respondent failed to honour an undertaking given to Ms Geringer of the Law Society on 23 March 2006, to report back to her;
- 10.8 The First Respondent failed to reply to correspondence addressed to him by the Law Society on 6 September 2005, 28 April 2006 and 9 June 2006;
- 10.9 The First Respondent failed to pay fines imposed by a disciplinary committee of the Council of the Law Society and persisted in his failure.

Record: See page 52

- [11] 11.1 The approach of the court in relation to trust shortages and the duty of an attorney with regard to trust money was stated in Law Society, Transvaal v Matthews (*supra*) on 394 as follows:

“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 118 F – H. An attorney’s duty in regard to the preservation of trust money is a fundamental, positive and 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 905 H. It is significant that in terms of section 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.”

- 11.2 On 395 the Court said the following regarding the keeping of proper accounting records by a practitioner:

“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. See Cirota and Another v Law Society, Transvaal (supra at 193 F – G). The seriousness is again underlined in rule 89 read with rule 89(11) of the applicant’s rules which provides that it is unprofessional or dishonourable or unworthy conduct on the part of the practitioner to contravene the provisions of the Attorneys Act or the applicant’s rules”.

See also: Malan v The Law Society of the Northern Provinces [2008] ZASCA 90 (12 September 2008) at paragraphs [10] to [11].

11.3 In the absence of any acceptable explanation by the respondents and in view of the proof furnished by the Law Society for the allegations in the founding and replying affidavits, which are serious, the inevitable conclusion is that First Respondent can no longer be regarded as a fit and proper person to continue to practise as an attorney.

11.4 The Law Society submitted that a proper case has been made out for the order sought and the Law Society asked that same be granted with costs.

[12] When the matter came before this Court the Respondents attempted to have a further affidavit handed up by their counsel wherein it is allegedly explained that the missing funds of the Mirror Trust had been found and was allegedly credited in the name of another trust creditor and the Respondents sought a postponement to have the matter sorted out with the Law Society. This court clearly was not prepared to fall for this trick to delay the matter and the Court refused to receive the additional affidavit and refused to postpone the matter and the matter was fully argued and judgment was reserved.

[13] First Respondent has contravened at least the following provisions of the Act and the Rules:

- a) Rule 68.4.2 of the Rules due to the fact that the First Respondent failed to retain his accounting records at no other place than his main office;
- b) Rule 69.7 of the Rules due to the fact that the First Respondent failed to at intervals of not more than three calendar months extract a list of trust creditors and compare the total of the list with the firm's trust bank balance;

- c) Section 70 of the Act due to the fact that the First Respondent failed to comply with a direction of the Law Society to produce for inspection to a person authorised thereto, the firm's accounting records;
- d) Rule 89.25 of the Rules due to the fact that the First Respondent failed to comply with an order, requirement or request of the Council of the Law Society;
- e) Rule 68.7 of the Rules due to the fact that the First Respondent failed to, within a reasonable time after the performance or earlier termination of his mandate, account to his client in writing in accordance with the requirements of Rule 68.7;
- f) Rule 69.8 of the Rules due to the fact that the First Respondent delayed the payments of trust funds; and
- g) Section 78(1) of the Act read with Rule 69.3.1 of the Rules due to the fact that there is a trust deficit in the First Respondent's bookkeeping

[14] It is not necessary to deal in this judgment with the numerous other complaints against the First Respondent received by the Law Society.

[15] It is clear that that the First Respondent is no longer a fit and proper person to remain on the roll of attorneys and the following order is made:

"1. That the name of Sello Nkurumah Moima (the first respondent) be struck from the roll of attorneys of this Honourable Court and he is ordered to pay the costs of the application and of the hearing on the 24th August 2012 on the attorney and client scale.

2. That the first respondent immediately surrenders and delivers to the Registrar of this Honourable Court his certificate of enrolment as an attorney of this Honourable Court.
3. That in the event of the respondent failing to comply with the terms of this order detailed in the previous paragraph within two (2) weeks from the date of this order, the sheriff of the district in which the certificate is, be authorised and directed to take possession of the certificate and to hand it to the Registrar of this Honourable Court.
4. That the respondent be prohibited from handling or operating on his trust accounts as detailed in paragraph 5 hereof.
5. That Johan van Staden, the head: members affairs of applicant or any person nominated by him, be appointed as *curator bonis* (curator) to administer and control the trust accounts of respondent, including accounts relating to insolvent and deceased estates and any deceased estate and any estate under curatorship connected with respondent's practice as an attorney and including, also, the separate banking accounts opened and kept by respondent at a bank in the Republic of South Africa in terms of section 78(1) of Act No 53 of 1979 and/or any separate savings or interest-bearing accounts as contemplated by section 78(2) and/or section 78(2A) of Act No. 53 of 1979, in which monies from such trust banking accounts have been invested by virtue of the provisions of the said sub-sections or in which monies in any manner have been deposited or credited (the said accounts being hereafter referred to as the trust accounts), with the following powers and duties:
 - 5.1 immediately to take possession of respondent's accounting records, records, files and documents as referred to in paragraph 6 and subject to the approval of the board of control of the attorneys fidelity fund (hereinafter referred to as the fund) to sign all forms

and generally to operate upon the trust account(s), but only to such extent and for such purpose as may be necessary to bring to completion current transactions in which respondent was acting at the date of this order;

- 5.2 subject to the approval and control of the board of control of the fund and where monies had been paid incorrectly and unlawfully from the undermentioned trust accounts, to recover and receive and, if necessary in the interests of persons having lawful claims upon the trust account(s) and/or against respondent in respect of monies held, received and/or invested by respondent in terms of section 78(1) and/or section 78(2) and/or section 78(2A) of Act No 53 of 1979 (hereinafter referred to as trust monies), to take any legal proceedings which may be necessary for the recovery of money which may be due to such persons in respect of incomplete transactions, if any, in which respondent was and may still have been concerned and to receive such monies and to pay the same to the credit of the trust account(s);
- 5.3 to ascertain from respondent's accounting records the names of all persons on whose account respondent appears to hold or to have received trust monies (hereinafter referred to as trust creditors) and to call upon respondent to furnish him, within 30 (thirty) days of the date of service of this order or such further period as he may agree to in writing, with the names, addresses and amounts due to all trust creditors;
- 5.4 to call upon such trust creditors to furnish such proof, information and/or affidavits as he may require to enable him, acting in consultation with, and subject to the requirements of, the board of control of the fund, to determine whether any such trust creditor has a claim in respect of monies in the trust account(s) of respondent and, if so, the amount of such claim;

- 5.5 to admit or reject, in whole or in part, subject to the approval of the board of control of the fund, the claims of any such trust creditor or creditors, without prejudice to such trust creditor's or creditors' right of access to the civil courts;
- 5.6 having determined the amounts which he considers are lawfully due to trust creditors, to pay such claims in full but subject always to the approval of the board of control of the fund;
- 5.7 in the event of there being any surplus in the trust account(s) of respondent after payment of the admitted claims of all trust creditors in full, to utilise such surplus to settle or reduce (as the case may be), firstly, any claim of the fund in terms of section 78(3) of Act No 53 of 1979 in respect of any interest therein referred to and, secondly, without prejudice to the rights of the creditors of respondent, the costs, fees and expenses referred to in paragraph 10 of this order, or such portion thereof as has not already been separately paid by respondent to applicant, and, if there is any balance left after payment in full of all such claims, costs, fees and expenses, to pay such balance, subject to the approval of the board of control of the fund, to respondent, if he is solvent, or, if respondent is insolvent, to the trustee(s) of respondent's insolvent estate;
- 5.8 in the event of there being insufficient trust monies in the trust banking account(s) of respondent, in accordance with the available documentation and information, to pay in full the claims of trust creditors who have lodged claims for repayment and whose claims have been approved, to distribute the credit balance(s) which may be available in the trust banking account(s) amongst the trust creditors alternatively to pay the balance to the Attorneys Fidelity Fund;

- 5.9 subject to the approval of the chairman of the board of control of the fund, to appoint nominees or representatives and/or consult with and/or engage the services of attorneys, counsel, accountants and/or any other persons, where considered necessary, to assist him in carrying out his duties as curator; and
- 5.10 to render from time to time, as curator, returns to the board of control of the fund showing how the trust account(s) of respondent has/have been dealt with, until such time as the board notifies him that he may regard his duties as curator as terminated.
6. That respondent immediately deliver his accounting records, records, files and documents containing particulars and information relating to:
- 6.1 any monies received, held or paid by respondent for or on account of any person while practising as an attorney;
- 6.2 any monies invested by respondent in terms of section 78(2) and/or section 78 (2A) of Act No 53 of 1979;
- 6.3 any interest on monies so invested which was paid over or credited to respondent;
- 6.4 any estate of a deceased person or an insolvent estate or an estate under curatorship administered by respondent, whether as executor or trustee or curator or on behalf of the executor, trustee or curator;
- 6.5 any insolvent estate administered by respondent as trustee or on behalf of the trustee in terms of the Insolvency Act, No 24 of 1936;

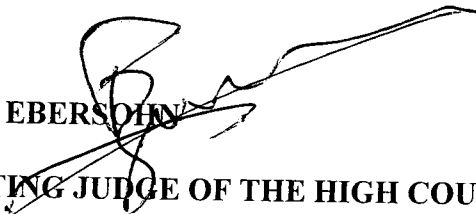
- 6.6 any trust administered by respondent as trustee or on behalf of the trustee in terms of the Trust Properties Control Act, No 57 of 1988;
- 6.7 any company liquidated in terms of the Companies Act, No 61 of 1973, administered by respondent as or on behalf of the liquidator;
- 6.8 any close corporation liquidated in terms of the Close Corporations Act, 69 of 1984, administered by respondent as or on behalf of the liquidator;
- 6.9 respondent's practice as an attorney of this Honourable Court, to the curator appointed in terms of paragraph 5 hereof, provided that, as far as such accounting records, records, files and documents are concerned, respondent shall be entitled to have reasonable access to them but always subject to the supervision of such curator or his nominee.

[7] That should respondent fail to comply with the provisions of the preceding paragraph of this order on service thereof upon him or after a return by the person entrusted with the service thereof that he has been unable to effect service thereof on respondent (as the case may be), the sheriff for the district in which such accounting records, records, files and documents are, be empowered and directed to search for and to take possession thereof wherever they may be and to deliver them to such curator.

[8] That the curator shall be entitled to:

- 8.1 hand over to the persons entitled thereto all such records, files and documents provided that a satisfactory written undertaking has been received from such persons to pay any amount, either determined on taxation or by agreement, in respect of fees and disbursements due to the firm;

- 8.2 require from the persons referred to in paragraph 8.1 to provide any such documentation or information which he may consider relevant in respect of a claim or possible or anticipated claim, against him and/or respondent and/or respondent's clients and/or fund in respect of money and/or other property entrusted to respondent provided that any person entitled thereto shall be granted reasonable access thereto and shall be permitted to make copies thereof;
- 8.3 publish this order or an abridged version thereof in any newspapers he considers appropriate.
9. That if there are any trust funds available the respondent shall within 6 (six) months after having been requested to do so by the curator, or within such longer period as the curator may agree to in writing, shall satisfy the curator, by means of the submission of taxed bills of costs or otherwise, of the amount of the fees and disbursements due to him in respect of his former practice, and should he fail to do so, he shall not be entitled to recover such fees and disbursements from the curator without prejudice, however, to such rights (if any) as he may have against the trust creditor(s) concerned for payment or recovery thereof;
10. That a certificate issued by a director of the Attorneys Fidelity fund shall constitute *prima facie* proof of the curator's costs and that the Registrar be authorised to issue a writ of execution on the strength of such certificate in order to collect the curator's costs.


P.Z. EBERSOHN

ACTING JUDGE OF THE HIGH COURT

I AGREE:



M.R. CHETTY

ACTING JUDGE OF THE HIGH COURT

Applicants' attorneys

Rooth & Wessels

Ref.J. Leotlela/B29238