REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

26/7/2013.

CASE NO: 8675/2009

(1) REPORTABLE: ~~YES~~ / NO

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

(3) REVISED.

2013/07/24
DATE

SIGNATURE

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES Applicant

and

MAGGY PEBETSE MASHILOANE Respondent

J U D G M E N T

SETHUSHA, AJ:

[1] This is an application by the Law Society of the Northern Provinces (the Law Society) to strike the name of the respondent from the roll of attorneys of this court, and related ancillary relief. An order for the suspension of the respondent from practicing as an attorney was granted by this court on 11 July 2012. The application is unopposed, despite it having been personally served on the respondent on

1 October 2012 at her place of residence. She did not deliver a notice of intention to oppose, nor was there any appearance on her behalf at the hearing.

[2] The respondent was admitted as an attorney of this court on 17 July 2006 and practiced as a partner in the firm Stols Van Heerden Attorneys until 31 August 2006. With effect from 8 December 2008 she practiced for her own account under the name and style of M.P Mashiloane Attorneys. The complaint of the Law Society relates to the period she practiced as a sole practitioner. The Law Society initiated this application after receiving a complaint from the respondent's client, Mr. Max Sisulu, which I shall deal with later.

[3] Before I consider the merits of the application, it is prudent to set out the applicable general principles.The applications 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. 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] 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* 2003 (2) SA 11 (SCA). Once a court has determined that an attorney is not 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* 1981 (1) SA 762 (T) at 781H.

[5] 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 concern 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 (*Law Society, Northern Provinces v Mogami and Others* 2010(1) SA 186; [2010] 1 All 315 (SCA) para 14).

[6] *In Summerley v Law Society, Northern Provinces* [2006] SCA 59 (RSA) para 2, 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'.

An overview of the complaints against the respondent

[7] The Law Society alleges that the respondent has made herself guilty of several transgressions of its rules. However, the main complaint relates to misappropriation of trust funds. The ancillary complaints concern practicing without being in possession of a fidelity fund; failure to give proper attention to the affairs of her client; failure to comply with various rules applicable to administration of estate, and failure to proper books of business.

Complaint by Mr. Max Vuyisile Sisulu

[8] Effectively, all the above complaints were triggered by a complaint lodged with the Law Society by Mr. Max Vuyisile Sisulu (Sisulu). Sisulu instructed the respondent to act as his agent in the administration of the deceased estate of his the late son, Mr. Mlungisi Sisulu. An amount of R457 173.15 was received in the estate account. Of this amount, the respondent misappropriated a total of R310 546.81. An amount of R146 626.34 was paid in accordance with the instruction of the deceased's surviving spouse. A bank statement of the firm's trust account dated 22 December 2011 reflected a balance of R65.47.

[9] In response to Sisulu's complaint, the respondent admitted to the Law Society to have misappropriated the estate money, both in her written response to the complaint, and during formal disciplinary hearing. She also admitted during the hearing of having failed to finalise the estate of the late Sisulu within the required period and not having distributed the account, and having lied to Sisulu about the progress made in finalization of the estate.

[10] The respondent explained to the Law Society her reasons for misappropriating the money as follows. During 2008 the firm in which she was a partner, experienced

financially difficulties as a result of the world-wide recession. Her salary as a partner was reduced, and she was 'constructively dismissed' at the end of August 2008. She became unemployed and without an income. She gave birth to a baby in September 2008. Her husband was not supportive of her. She was threatened with foreclosure on her mortgage bond, and the repossession of her house became a real possibility. She commenced her practice for her own account on 8 December 2008.

[11] In her own words, the respondent stated the following to the Law Society:

> 'I eventually thought of the money that was entrusted to me - Estate late Sisulu's money. I started by withdrawing R 4500.00, which was equal to the salary I was earning after the cut-off. I could not survive without money, where I was staying; I could not ask money from my husband. He enjoyed seeing me like that. The following months I did the same thing, also patching for the arrears that I was already into, with the intention that, I when my baby is older I will find another job and repay every cent. The money that I used from the estate is plus/minus R300, 000.00.
>
> This thing is haunting me and I am not confident in everything I did, and I am not proud about all this. I admit that I committed a very serious offence, and was very wrong in that I failed to act as expected from an attorney. I am also aware that this might lead to me being arrested and being struck from the roll of attorneys. I have read several articles where people got arrested and even got struck of for even smaller amount than the one in my case. I as well know that this might be the case. I also admit that I stopped communicating with the clients, as I did not know how I was going to tell them about this situation. I had to create the delaying tactics, with a hope that things will turn out good'.

[12] Having admitted to a misappropriation of trust funds, the respondent has exhibited conduct which is clearly inconsistent with membership of the attorneys' profession. The respondent has thus rendered herself unworthy to remain on the roll of attorneys. What remains to be determined is the sanction to be imposed on the respondent – whether to strike her off the roll or simply extend her suspension.

[13] In my view, the complaint against the respondent is so serious that the only sanction I deem suitable under the circumstances, is the striking of her name from the roll of attorneys. I come to this conclusion very painfully, in light of the respondent's personal circumstances outlined in para [11] above. Obviously, those circumstances would be considered in her favour when, and if, the respondent applies for re-admission.

[14] 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 on that basis that costs are granted on an attorney and client scale. The Law Society has requested such a cost order. I see no reason why it should not be granted.

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

1. The name of **MAGGY PEBETSE MASHILOANE** (the respondent) is struck from the roll of attorneys 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.

NC SETHUSHA
ACTING JUDGE OF THE HIGH COURT

I agree

TM MAKGOKA
JUDGE OF THE HIGH COURT

DATE HEARD	:	12 APRIL 2013
JUDGMENT DELIVERED	:	26 JULY 2013
FOR THE APPLICANT	:	MS S MAGARDIE
INSTRUCTED BY	:	DAMONS MAGARDIE RICHARDSON ATTORNEYS, PRETORIA

NO APPEARANCE FOR THE RESPONDENT

annexure "A"

'A'

26/02/2013

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

Case number: 35276/2012

In the application of:

THE LAW SOCIETY OF THE NORTHERN PROVINCES

(Incorporated as the Law Society of the Transvaal) Applicant

and

MAGGY PEBETSE MASHILOANE Respondent

~~DRAFT~~ ORDER OF COURT

Having read the papers filed of record and having heard the attorney for the Applicant,

IT IS ORDERED

1. That the name of **MAGGY PEBETSE MASHILOANE** (hereinafter referred to as the respondent) be removed from the roll of attorneys of this Honourable Court.

2. That respondent hands and delivers her certificate of enrolment as an attorney to the Registrar 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 respondent be prohibited from handling or operating on her 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 under mentioned 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/she 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/her 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/her 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.

9. That respondent be and is hereby removed from office as:

9.1 executor of any estate of which respondent has been appointed in terms of section 54(1)(a)(v) of the Administration of Estates Act, No 66 of 1965 or the estate of any other person referred to in section 72(1);

9.2 curator or guardian of any minor or other person's property in terms of section 72(1) read with section 54(1)(a)(v) and section 85 of the Administration of Estates Act, No 66 of 1965;

9.3 trustee of any insolvent estate in terms of section 59 of the Insolvency Act, No 24 of 1936;

9.4 liquidator of any company in terms of section 379(2) read with 379(e) of the Companies Act, No 61 of 1973;

9.5 trustee of any trust in terms of section 20(1) of the Trust Property Control Act, No 57 of 1988;

9.6 liquidator of any close corporation appointed in terms of section 74 of the Close Corporation Act, No 69 of 1984.

10. That respondent be and is hereby directed:

10.1 to pay, in terms of section 78(5) of Act No. 53 of 1979, the reasonable costs of the inspection of the accounting records of respondent;

10.2 to pay the reasonable fees of the auditor engaged by applicant;

10.3 to pay the reasonable fees and expenses of the curator, including travelling time;

10.4 to pay the reasonable fees and expenses of any person(s) consulted and/or engaged by the curator as aforesaid; and

10.5 to pay the costs of this application on an attorney-and-client scale.

11. 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/her (respondent) in respect of his/her former practice, and should he/she fail to do so, he/she shall not be entitled to recover such fees and disbursements from the curator without prejudice, however, to such rights (if any) as he/she may have against the trust creditor(s) concerned for payment or recovery thereof;

12. 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.

BY ORDER OF THE COURT

REGISTRAR