REPUBLIC OF SOUTH AFRICA

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

16/8/2013

CASE NUMBER: 60344/2012

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED.

16/08/2013
DATE SIGNATURE

In the matter:

THE LAW SOCIETY OF THE NORTHERN PROVINCES **APPLICANT**

AND

KGAUGELO JOSEPHINE PETA **RESPONDENT**

JUDGMENT

LAMPRECHT, AJ

Introduction

[1] This is an application in terms of section 22(1)(d) of the Attorneys Act 53 of 1979 (the Attorneys Act), for the removal of the Respondent's name from the roll of attorneys and conveyancers.

[2] Initially an urgent application was brought to this Court. After four unsuccessful attempts on 19, 20, 22 and 23 October 2012, the papers were eventually served on Respondent's brother on 24 October 2012. This service was felt to be necessary because Respondent could not be found at her practice at second floor, Newgate Building, 108 Jeppe Street, Newtown, Johannesburg, of which the doors were kept locked and no alternative service was possible but to append the Notice of Motion to the door of the practice.

[3] No Notice to Oppose was filed and Respondent was suspended from practice as an attorney and conveyancer by order of this Court dated 13 November 2012, pending the removal of her name from the roll of attorneys and conveyancers.

[4] Attempts to have the Court Order and the Notice of Set Down (in respect of the application for removal) served and / or executed on the Respondent proved fruitless as she was nowhere to be found, not even at her given residential address at 12 Flamingo Villas, 800 Vermooten Street, Princess AH X 3, ROODEPOORT. On 30 January 2013 the present occupier of the mentioned

residential address informed the Sheriff that Respondent has left the address with no forwarding address, but the Notice of Set Down was in any event posted to the door of said residence.

[5] An application for substitutive service was brought on 31 July 2013, which was duly authorized and ordered by this Court (Kruger AJ). The Court Order was that the Notice of Set Down could be published in one issue of The Star and one issue of the Sunday Times newspapers, which newspapers circulate in Gauteng and the broader South Africa. Publication took place only in the Sunday Times of 04 August 2013, but, a satisfactory explanation was tendered. In any event, the Sunday Times is the paper that is the most widely circulated among the two and, even though publication was effected such a short time before the date of set down, we are, in the light of the above and what follows, of opinion that no other means of service would have proven to be more effective to avoid judgment on an unopposed basis.

The facts

[6] 6.1 Respondent was admitted and enrolled as an attorney of this Court on 27 February 2006. She practiced as a professional assistant at Tim Du Toit & Co Incorporated from 1 March 2006 to 28 February 2007; and, at Colin Mabunda Incorporated from 1 march 2007 to 30 November 2010. She commenced practicing as a sole practitioner for her own account

under the name and style of KJ Peta Attorneys with effect from 03 January 2011.

6.2 Since inception of the firm on 03 January 2011, Respondent has failed to lodge her firm's opening audit report and, as a result, no Fidelity Fund Certificate was issued to her. She thus practiced for own account for reward without such certificate, in the process contravening section 41 of the Attorneys Act, which is also declared a criminal offence in terms of section 83(10) of the Act. Applicant commissioned one of its employees, Ms Jackie Bezuidenhout to conduct an investigation into Respondent's firm in this regard. In her report she explains that she has experienced much difficulty in executing her mandate as the Respondent was evasive and cancelled pre-arranged meetings; and, she initially failed to answer to correspondence regarding the submission of her firm's opening audit report. In a letter dated 22 May 2012, Respondent advised Applicant that she had appointed Trezifin Professional Accountants as her auditors and undertook to furnish Applicant with the original audit report as soon as finalized, which to date, she has failed to do.

6.3 At least 24 complaints were lodged with Applicant against the Respondent for conduct which can best be described dishonourable, unprofessional and unworthy of a practitioner. These complaints relate to:

- Failure to execute clients' instructions.

- Failure to pay over funds to clients and failure to render proper statements of account to client.
- Failure to attend to the registration and transfer of properties as per her mandate and failure to repay the monies deposited into her firm's trust account for that purpose.
- Failure to attend to the winding up of deceased estates after her appointment as executor; failure to give progress reports regarding the affairs of the deceased estates; and, failure to transfer properties into the name of surviving spouses or beneficiaries of estates.

6.4 In almost all of these matters, Applicant tried in vain to contact Respondent, since she has quite apparently abandoned the premises where she conducted her practice and could not be reached telephonically or otherwise.

6.5 Applicant commissioned an investigation by one of its employees, Ms Phossina Mapfumo, into the affairs of Respondent's firm. Although Mapfumo could not reach the Respondent to address any of the above complaints that Applicant received, she established the existence of a trust deficit of approximately **R1, 851, 174.98**. Respondent's trust bank balance reflected an amount of only **R469.13**.

6.6 The Respondent currently being unreachable, it is clear that she has abandoned her practice without giving her clients or Applicant any notice and even without handing over the files of clients matters to another practitioner.

6.7 According to Applicant and the Report of Mapfumo, Respondent has *inter alia* contravened the following provisions of the Attorneys Act and the Applicant's Rules:

- Section 41 of the Attorneys Act - practicing without being in possession of a Fidelity Fund Certificate;
- Section 70 of the Attorneys Act - failure to comply with Applicant's directive to produce for inspection the accounting records of the firm;
- Rule 68.7 - failure, within reasonable time, after the performance or earlier termination of the mandate received from the complainants, to furnish them with a detailed and written statement of account;
- Rule 68.8 - Failure, within reasonable time, to pay any amount due to the complainant's;
- Rules 70.3 and 70.4 - Failure or neglect to file her firm's Rule 70 audit report within or at the required time;
- Rule 89.15 - failure to give proper attention to the affairs of her clients;

- Rule 89.17 - abandonment of practice without prior notice to clients and Applicant;
- Rule 89.23 - failure, within reasonable time, to answer or appropriately deal with any communication which reasonably required a reply or response;
- Rule 89.25 - failure to comply with an order, requirement or request of the Applicant;
- Rule 89.30 - failure, without lawful excuse, to perform work of a kind that is commonly performed by a practitioner, with the degree of skill, care, attention and quality and standard expected of a practitioner; and,
- failure to explain and / or deal with the mentioned trust deficit, justifying criminal investigation and prosecution if she could be found.

Exposition of the law

[7] Applications of this nature are regarded as *sui generis* and of a disciplinary nature. There is no *lis* between the Law Society and the respondent. Its duty as *custos morum* of the profession requires of the Law Society merely to place the relevant facts before the Court for consideration. - ***Solomon v The Law Society of the Cape of Good Hope*** **1934 AD 401 at 407;** ***Hassim v Incorporated Law Society of Natal*** **1977 (2) SA 757 (A) at 767 C-G;** ***Cirota and Another v Law Society Transvaal*** **1979 (1) SA 172 (A) at 187 H;** ***Law***

Society of Transvaal v Matthews 1989 (4) SA 389 (T) at 393 E; and *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 851 E-F.

[8] In terms of section 22(1)(d) of the Attorneys Act The question whether an attorney is a fit and proper person lies in the discretion of the court. - ***Hassim v Incorporated Law Society of Natal, supra loc cit***; ***Law Society of the Cape of Good Hope v C*** 1986 (1) SA 616 (A); *A v Law Society of the Cape of Good Hope* 1989 (1) SA 849 (A) at 851 A-F; *Law Society of Transvaal v Matthews, supra* at 393 I-J; *Vassen v Law Society of the Cape of Good Hope* 1998 (4) SA 532 (SCA); *Jassat v Natal Law Society* 2000 (3) SA 44 (SCA); *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA).

[9] Regardless of the provisions of the Attorneys Act, the Court in any event has inherent jurisdiction to determine whether an attorney is a fit and proper person to practice as such. - ***Law Society of the Cape of Good Hope v C,*** **supra at 638C - 639F; Prokureursorde** ***van Transvaal v Kleynhans, supra loc cit***; *Law Society of the Transvaal v Machaka and Others (No 2)* 1998 (4) SA 413 (TPD); *Law Society of the Transvaal v Tloubatla* [1999] 4 ALL SA 59 (D) at 63 G-I.

[10] The facts on which a court exercises its discretion are to be established on a balance of probabilities. - ***Olivier v Die Kaapse Balie-Raad*** 1972 (3) SA 485 (A) at 496 F-G; *Law Society of Transvaal v Matthews, supra* at 393 I-J;

Prokureursorde van Transvaal v Kleynhans, supra **at 853 I-J;** ***Summerley v Law Society of the Northern Provinces*** **2006 (5) SA 613 (SCA) at 615 B-F.**

[11] The opinion or conclusion of the Law Society after its own investigation of the matter usually carries great weight in the Court's consideration, although the Court is not bound by it. - ***Die Prokureursorde van die Oranje Vrystaat v Schoeman*** **1977 (4) SA 588 (O) at 603 A-B;** ***Kaplan v Incorporated Law Society, Transvaal*** **1981 (2) SA 762 (T) at 781 H.**

[12] The very nature of disciplinary proceedings are such that it is expected from a respondent against whom a *prima facie* case of unprofessional conduct has been made out to co-operate and, where necessary, to place information before the Court to enable the Court to have the full facts on which an informed decision can be made as to the fitness of the respondent to practice as an attorney. - ***Prokureursorde van Transvaal v Kleynhans, supra*** **at 853 G-H.**

[13] Naturally, the facts upon which a court's discretion is based should be considered in their totality, not each and every fact in isolation. - ***Beyers v Pretoria Balieraad*** **1966 (2) SA 593 (A) at 606 B;** ***Law Society of the Cape of Good Hope v Segall*** **1975 (1) SA 95 (C) at 99 B;** ***Prokureursorde van Transvaal v Kleynhans, supra loc cit*****, paragraph [9];** ***Malan v Law Society of the Northern Provinces*** **[2009] ALL SA 133 (SCA).**

[14] Lastly, the appropriate sanction where the Court finds that a person is no longer a fit and proper person for the profession, namely suspension from practice or striking from the roll of attorneys, also lies within the discretion of the Court. - ***Jassat v Natal Law Society, supra*** **at 51 B-I;** ***Law Society of the Cape of Good Hope v Buddricks, supra*** **at 13 I, 14 A-B;** ***Malan v Law Society of the Northern Provinces, supra*** **at 137**.

[15] Thus, the Court should approach matters such as these as follows:

15.1 Firstly, the Court must decide as a matter of fact whether the alleged misconduct on the part of the attorney has been established on a balance of probabilities;

15.2 Second, and based on its finding that misconduct has been established, the Court must exercise a value judgment to decide whether the person is still a fit and proper person that can be allowed to practice as an attorney. - **For an analysis on what a 'fit and proper person' is in the context of the attorney profession, see** ***Kaplan v Incorporated Law Society, Transvaal, supra*** **at 782 A-C;** ***Reyneke v Wetsgenootskap van die Kaap die Goeie Hoop*** **1994 (1) SA 359 at 369-70.**

15.3 Where the Court holds that the person is no longer a fit and proper person for the profession, the Court must exercise its discretion whether, in all the circumstances of the case, the attorney in question is to be removed from the roll of attorneys or merely suspended from practice. Ultimately, this is a question of degree.

Applying the law to the facts

[16] An attorney must scrupulously comply with the provisions of the Attorneys Act and the Rules promulgated thereunder, especially in relation to money of clients which are placed into his or her custody and control - 'trust'. It is trite that trust money does not form part of the assets of an attorney. The very essence of a trust fund is the absence of risk for a client and the confidence engendered thereby. Unjustified handling of trust money has always been regarded as totally unacceptable in that it frustrates the legal requirements relating to trust and undermines the principle that a trust is regarded as completely safe in respect of the money held therein by an attorney on behalf of another person. Misappropriation of trust funds is regarded as so serious that an attorney is almost invariably struck from the roll of attorneys and, if criminal prosecution results in conviction, such attorneys almost always are sentenced to direct gaol terms. The trust deficit of more than a Million Rand is therefore enough reason for ordering the removal of Respondent's name from the roll of attorneys.

[17] The other contraventions of the Act and Rules referred to above are equally serious, and there can be no other outcome in this matter than that an order be issued that Respondent's name is to be removed from the roll of attorneys and conveyancers. We are of the opinion, on the papers, that she is not a fit and proper person to practice as an attorney, which is an honourable profession.

[18] The only problem that Applicant has in this matter, is the fact that, contrary to Kruger AJ's order of 31 July 2013, the Notice of Set Down was published in only one newspaper instead of two as ordered.

[19] In the light thereof,

(a) that Respondent has, according to the available evidence, absconded from and abandoned practice as soon as she sensed that something seriously was amiss and that Applicant was investigating her practice;

(b) that she has not filed any opposition after the original papers were served on her practice and her brother when she could not be found;

(c) that she has absconded from the physical address of both her practice and her residence, without any notification to Applicant or her clients, resulting in a situation that she cannot be reached; and,

(d) because the newspaper in which the substituted service was published, the Sunday Times, circulates country wide -

we are of the opinion that Respondent can only have herself to blame if she did not receive any proper notification of the Set Down and the Court Order suspending her from practice pending this application. It appears to be nigh impossible for Applicant to reach her for proper service of the papers in this matter. In any event, as the matter is unopposed it should in our view be dealt with on the same bases as a default judgment and, if Respondent later finds out that the order below was granted in her absence and she feels aggrieved for not having been notified of the application, she can always in terms of the rules or the common law apply for a rescission of the order. Or she can always apply for re-admission as an attorney and conveyancer. In such a case she would naturally have to show good cause as to why she could not be reached for purposes of proper service of the papers in this matter and as to why she should be regarded as a fit and proper person to practice law as an attorney and conveyancer..

[20] The non-compliance with the order authorizing substituted service is therefore condoned and the following order is issued:

> 20.1 That the name of the Respondent is removed from the roll of attorneys and conveyancers. In this regard, the draft court order supplied by Applicant is made an order of the court and is attached hereto.

20.2 Respondent is ordered to pay the costs for the applications on an attorney client scale.

A A LAMPRECHT
ACTING JUDGE OF THE NORTH
GAUTENG HIGH COURT

I agree

V SN NKOSI
ACTING JUDGE OF THE NORTH
GAUTENG HIGH COURT

Representation for the applicant:

Ms SL Magardie

Attorneys: Damons Magardie Richardson Attorneys

Representation for respondent

Counsel No appearance

Instructed by

"X-J2"

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

Case number: 60344/2012

In the application of:

THE LAW SOCIETY OF THE NORTHERN PROVINCES

(Incorporated as the Law Society of the Transvaal) Applicant

and

KGAOGELO JOSEPHINE PETA 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 **KGAOGELO JOSEPHINE PETA** (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