



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

8/11/13

CASE NO: 73021/12

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
 (2) OF INTEREST TO OTHERS JUDGES: **NO**
 (3) REVISED

8/11/2013
 DATE SIGNATURE

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES

APPLICANT

and

MADIMETIA GILBERT SEKUKUNI

RESPONDENT

JUDGMENT

MOGOTSI AJ:

[1] INTRODUCTION

This is an application in terms of Section 22 (1) (d), of the Attorneys Act 53 of 1979 (as amended) to strike the Respondent's name from the roll of attorneys of this Honourable Court with costs on attorney and client scale and related ancillary relief as set out in the Notice of Motion.

The papers were served on the Respondent's wife on 5 February 2013 and on the Respondent on the 13 March 2013. The Respondent filed notice to oppose the application on the 20 March 2013 but he failed to file his answering affidavit.

A Notice of set down was served on Respondents Corresponding attorneys on 13 May 2013.

[2] THE PARTIES

The Applicant is the Law Society of Northern Provinces which exists by virtue of Attorneys, Notaries and Conveyances Admission Act no 23 of 1934 and continues further in existence by virtue of Section 56 of the Attorneys Act no 53 of 1979.

The Respondent is Madimetja Gilbert Sekukuni, who was admitted and enrolled as an Attorney of this Honourable Court on 16 April 2007. His name is still on the roll.

The Respondent is currently still practising as a sole Practitioner on his own account under the name and style of Sekukuni Attorneys. Situated at suite 801, Mansion House, 8th Floor, Corner Market and Kruis streets, with effect from 01 May 2007. He is therefore still on the roll of attorneys of this Honourable Court.

[3] BACKGROUND

The Applicant alleges that the Respondent's conduct constitute such a deviation from the standards of professional conduct that he is not a fit and proper person to continue to practise as an attorney.

According to the Applicant based on a report prepared by its office, the Respondent has *inter alia* contravened the following provisions of the Attorneys Act and Applicant's Rules:

1. Section 70 of the Attorneys Act in that he failed to comply with Applicant's directive to produce for inspection the accounting records of his Practise. The purpose of a Rule 70 auditors report is to satisfy the Law Society that an Attorney's accounting records are kept in accordance with the Provisions of the Rules and the Act and that an Attorney handles and administers trust monies entrusted to him by his clients properly and responsibly.
2. Rule 89.25 in that the Respondent failed to comply with an order, requirement or request of the Applicant.

3. Rule 68.7 in that the Respondent failed within a reasonable time, after the performance or earlier termination of the mandate received from a Complainant, namely Ms Portia Nkanazi Ndaba to furnish her with written statement of account setting out with reasonable clarity:
- Details of all amounts received by him in connection with the matter, appropriately explained.
 - Particulars of all disbursements and other payments made by him in connection with the matter
 - Fees and charges charged or raised against the client and where any represents an agreed fee, a statement that such fee was agreed upon and the amount so agreed
 - Rule 68.8 in that the Respondent did not pay any amount due to the complainant within a reasonable time; and
 - Section 78(1) read together with Rule 69.3.1 in that the firm did not ensure that the total amount of money in its trust account, trust investment account and trust cash at any date shall not be less than the total amount of the credit balances of the firms trust creditors.

The approach of the court in relation to trust shortages and a duty of an attorney with regard to trust money was stated in **Law Society Transvaal v Matthews, 1989 (4) SA389 (T) 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 an attorney should at all times have available liquid funds in 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 in this regard **Incorporated Law Society Transvaal v Visser & Others, also Incorporated Law Society Transvaal v Viljoen, 1958 (4) SA 115 (T) 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. See in this regard **Incorporated Law Society Transvaal v Behrman, 1977 (1) SA 984 (T) 905 H.** It is significant that in terms of Section 83 (13) of the Attorney’s Act, a practitioner who contravenes the provisions or

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.”

4. According to a report by Mapfumo (an auditor employed by the monitoring unit of the Law Society of the Northern Provinces) dated 19/6/2012, the Respondent failed to pay trust funds to Ms Ndaba.
5. The Respondent was alleged to have since moved from the address recorded in the Law Society register in May 2011. The Respondent was followed on 20 April 2012 to following address, office no 7A Town Square Plaza Burgersfort from where he appeared to be practising.

It was found that Mr Sekukuni had moved from the said office in May 2010. When the Respondent was contacted, he said his firm was still in Burgersfort where he was said to have moved and he further indicated that he was aware of the complaint by Ms Portia Nkanazi Ndaba. The Respondent requested Mapfumo to schedule a meeting with him which he failed to attend. Ms Ndaba had deposited an amount of R80 000.00 on the 22 July 2011 in the account of Sekukuni Attorneys: FNB Acc no.62167592297 via EFT.

The money was deposited for the transfer of a house into the name of Ms Ndaba. The house in question was later on said to have been bought by another person. Ms Ndaba subsequently unsuccessfully demanded her money back.

When Ms Ndaba eventually made contact with the Respondent, the latter undertook to pay back the money and he made a deposit of R20 000.00 on the 31 August 2011 and R11 000.00 on the 1 October 2011. Since then he has failed to make any further payments to her and is presently indebted to her in an amount of R49 000 plus interest. Attempts to recover the money by the applicant once more proved fruitless. Mr Sekukuni is said to be a magistrate in Limpopo.

The Applicant received another complaint on 30 May 2012 from Mr Funeka who had made a deposit of R3250.00 into the account of the Respondent. This was an initial deposit so that the Respondent could institute a claim for damages against a member of a taxi association.

The Respondent failed to report to the Complainant about progress made or not made in this matter. The Complainant unsuccessfully made several attempts to arrange further meetings with the Respondent.

The Complainant, Ms Nomsa Joyce Mfaba instructed the Respondent to institute a claim on her behalf against Road Accident Fund, following injuries she had sustained in a motor vehicle collision. The complainant could not get hold of the Respondent as the Respondent frequently moved from one office to another without informing the Complainant.

EXPOSITION OF THE LAW

Applications of this nature are *sui generis* and of a disciplinary nature. There is no *lis* between the Applicant and the Respondent. **Prokureursorde Van Transvaal v Kleynhans 1995 (1) SA 839 (T) at 851 E-F; Ciruta and Another v Law Society Transvaal 1979 (1) SA 172 (A) at 187 H.**

It is in the judicial discretion of the Court to determine whether an Attorney complained of is a fit and proper person in terms of section 22(1)(d) of the Attorneys Act. **Law Society of Cape of Good Hope v C 1986(1) SA 616 (A) at 637 C-E. Law Society Transvaal v Matthews 1989 (4) SA 3897 at 851 A-E.**

The Court has in any event inherent jurisdiction to determine whether an Attorney is a fit and proper to practise as such. **Law Society of the Transvaal v Tloubatha (1999) 4 ALL SA 59 (D) at 63 G-I.**

Thus an application of this nature involves a three stage enquiry by the Court. **Law Society of the Northern Provinces v Mogami 2010 (1) SA 189 SCA**

- a) The Court must determine whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual enquiry
- b) Whether the Attorney concerned is not a fit and proper person to continue to practise. This involves the weighing-up of the conduct complained of against the conduct expected of an Attorney hence a value judgment. **Kaplan v Incorporated Law Society, Transvaal 1981 (2) SA 762 (T) at 781 H.**
- c) Where the Court holds that the Attorney is no longer fit and proper 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 be suspended from Practise. Ultimately this is a question of degree. **Jassat v Natal Law Society 2000 (3) SA 44 (SCA)**

The opinion or conclusion of the Law Society after its own investigation of the matter usually carries great weight although the Court is not bound by it.

APPLYING THE LAW TO THE FACTS

The legal interest which the Law Society has in bringing this application flows from the Attorneys Act and the rules made under authority of Section 74 of that Act and Common Law.

In exercising the discretion in Section 22 (1) (d) to remove or suspend a errand Attorneys the approach of the Court has been to remove the names of the Attorneys who are guilty of misappropriation of trust funds from the roll: see **Incorporated Law Society v Salinger and Wolmarans 1917 TPD 660 at 670**. However, where mitigating factors are present the Courts deviate from that and merely impose a suspension. **Law Society of Cape of Good Hope v McLaren 1938 CPD 93** and The Law Society of the Northern Provinces [**Incorporated as the Law Society of the Transvaal**] v Goosen and Others (17289/04) [2009] ZAGPHC5 (23 January 2009).

This power is meant to *inter alia* maintain and enhance the prestige, status, dignity of the profession, public interest and to promote uniform practice and discipline among Practitioners. Turning to the conduct of the Respondent against what is complained of and how a reasonable Attorney should have acted or behaved. The conduct complained of is of a serious nature as it compromises the dignity and the integrity of the profession.

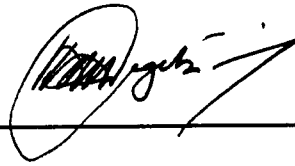
A reasonable Attorney under the circumstances would have acted differently by e.g. in a case of Abel Mfisileni Funeka and Ms Nomsa Joyce Mfaba instituting a claim for damages and in the case Ms Portia Nkanazi Ndaba attended to the registration of immovable property in the name of the complainant and or advised his/her clients accordingly and dealt with the money deposited in the Trust Account accordingly.

Alternatively a reasonable Attorney would have co-operated with the Applicant's endeavour to carry out investigations and or filed an answering affidavit after giving serious consideration to the circumstances of this application. I am of the view that there are no reasons placed before this Court to justify imposition of another order.

In my view the Respondent is not a fit and proper person to be admitted as an Attorney of this Honourable Court.

I accordingly propose the following order:

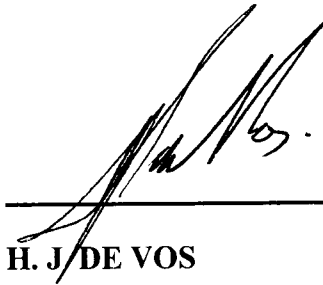
- That the draft order marked 'X' be made the order of this Court



D.D. MOGOTSI

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered,



H. J. DE VOS

JUDGE OF THE HIGH COURT