

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

Case No : 8306/10

In the matter between :

KwaZulu-Natal Law Society

Applicant

and

Mduduzi Humphrey Mbanjwa

Respondent

Judgment

Lopes J

[1] On the 19th October, 2010 a rule nisi was granted calling upon the respondent to show cause on or before the 26th October, 2010 why an order should not be made final that he is interdicted from operating any and all trust accounts currently in his control and in particular the Nedbank trust account number 310 5909 615. That order was to operate as an interim interdict pending the finalization of this application and the applicant was granted leave to supplement its papers insofar as it deemed necessary for any further relief it may seek against the respondent.

[2] The rule was extended to the 16th November, 2010 with costs to be costs in the cause. On the 8th November, 2010 the applicant filed a supplementary affidavit indicating that it would seek an order in terms of Annexure “AR16” to its original founding affidavit. That order appears at pages 89 – 96 of the papers and includes :-

- (a) that the respondent be struck off the roll of attorneys of the High Court and that he be interdicted and restrained from practicing or holding himself out as an attorney of this Court whilst his name is struck off the roll;
- (b) that he surrender and deliver to the Registrar his certificate of admission and enrolment as an attorney of this Court;
- (c) alternative relief in the event of him failing to comply with the above;
- (d) that the director of the applicant be appointed as curator to exercise the powers and duties described in the remainder of the order;
- (e) that the respondent be directed to surrender and deliver to the curator all his practice records set out in the draft order; and
- (f) the remainder of the order containing what may be described as the usual terms which apply in striking-out matters.

[3] On the 16th November, 2010 the respondent filed an answering affidavit, and the matter was adjourned *sine die* to enable the applicant to conduct further enquiries into the respondent’s conduct. Those enquiries are contained in an affidavit dated the 8th December, 2010 annexed to which

is an inspection report carried out by two officers of the applicant. The applicant seeks a final order striking the respondent from the roll of attorneys of this Court together with the ancillary relief set out in Annexure "AR16".

[4] The central issue in this matter arises as follows :-

- (a) the respondent was instructed by a Ms Radebe to lodge a claim with the Road Accident Fund (*"the RAF"*), which he did on the 5th May, 2008;
- (b) although it is disputed, the respondent claims that at the time he was given his original instructions he discussed the issue of a contingency fee with Ms Radebe. He did not reduce the agreement to writing and have it signed by Ms Radebe;
- (c) after rejecting an initial offer, a further offer was made by the RAF to Ms Radebe on the 28th May, 2009 in the sum of R299 492;
- (d) acting on the instructions of Ms Radebe to accept the offer, the respondent did so. He alleges that during the conversation when she gave him the instruction to accept the offer, he again raised with her that she would be liable for 25% of the capital payment as a contingency fee. At that stage this amounted to R74 873;
- (e) according to the respondent Ms Radebe said that she would revert to him on the contingency fee, and allegedly did so a few hours later confirming that it was in order;

- (f) on the 6th July, 2009 and pursuant to Ms Radebe's acceptance of their offer the RAF paid into the trust account of the respondent the sum of R299 492;
- (g) despite numerous requests that she be paid those monies no part thereof has as yet been paid to Ms Radebe;
- (h) Ms Radebe accordingly complained to the applicant in writing on the 11th November, 2009. On the 8th February, 2010 the applicant addressed the respondent enclosing Ms Radebe's complaint and requesting a response. In reply, and on the 24th February, 2010 the respondent addressed a letter to the applicant containing an affidavit by him setting out his version of events. In that affidavit a number of issues are raised by the respondent but he does not at any stage reveal what he did with Ms Radebe's money. In conclusion in his affidavit he states that from the 9th June, 2009 he had not received any correspondence or communication from Ms Radebe or the attorney appointed by her to terminate the respondent's mandate. As annexures to that affidavit he puts up the letter of offer from the RAF dated the 28th May, 2009, a letter from him dated the 29th May, 2009 addressed to Ms Radebe regarding the 25% contingency fee, and a document dated the 4th June, 2009 purporting to terminate his mandate. He also encloses a letter dated the 9th June, 2009 addressed to the attorneys purporting to represent Ms Radebe stating that the matter had been

settled and that he would not release the file of Ms Radebe because the matter has been finalized;

- (i) a further letter was addressed by the applicant to the respondent on the 25th March, 2010 requesting to know, *inter alia*, whether or not he had received the payment of the settlement amount and whether he had accounted to Ms Radebe for those funds. They also requested a copy of his ledger card relating to Ms Radebe. The respondent replied to this letter of the 8th April, 2010 advising that the monies had been paid into his trust account but that she had never reverted to him (and presumably that is why he had not paid her) and notifying the applicant that he had no ledger card relating to Ms Radebe, also apparently because she had not reverted to him;
- (j) on the 14th May, 2010 Ms Radebe again addressed the applicant *inter alia* saying that she had not received her monies. That letter was forwarded to the respondent on the 29th June, 2010 and the respondent replied that he had consulted with Ms Radebe on the 15th June, 2010 regarding the settlement of her matter “*of which we were proposing settlement and payment of her claim*”. She had indicated to him that she wanted him to prepare a bill of costs. He was accordingly proceeding with her instructions to appoint a costs consultant to draw a bill.
- (k) on the 16th August, 2010 the applicant notified the respondent that it

had appointed an inspection committee who would communicate with the respondent. The inspection which was carried out by two officers appointed by the applicant appears at pages 45 – 49 of the papers. The inspection report concludes that it is clear that Ms Radebe's money was received in July 2009 and inappropriately used by the respondent, and that it was no longer in his trust account. It further records that the money standing to the credit of the trust account relates to other clients. It recommended that the Law Society Council act urgently to prevent a further loss of trust monies;

- (l) on the 10th September, 2010 the applicant notified the respondent that he would be visited by the members of the Inspection Committee on the 28th September, 2010 at 11am when the respondent would be required to make available to the inspectors his file, the ledger account and trust bank statements from the 1st July, 2009 to date; and
- (m) on the 14th September, 2010 Mr Ngubane, one of the inspectors, recorded in a letter to the respondent that his employee Ms Shangase had advised him that the respondent had telephoned and left a message saying that his office had been broken into, and that some of his office items had been stolen. A full written report of the break-in was requested.

[5] Significant aspects of the affidavit deposed to by the respondent in answer to the applicant's allegations are the following :

- (a) at paragraph 18 he stated that after receiving payment from the RAF he had kept the monies in trust without investing them, pending the resolution of the dispute (a reference apparently to the complaint lodged against him). As appears later, that allegation is simply untrue because by the 1st February, 2010 the respondent's trust account had a balance of R96,78;
- (b) at paragraph 19 he stated that he holds business and trust accounts at Nedbank in Smith Street and that in respect of his business account he created a beneficiary profile for the majority of his trust creditors, and that, after transferring amounts from his trust account to his business account, he paid his trust creditors either by cheque or electronic payment. He stated that (for some unexplained reason) it was impossible to do direct transfers from his trust account to a beneficiary. (This was later denied by the respondent's Small Business Manager and the manager of Electronic Banking at Nedbank.) In any event it is clear from a perusal of the profile of the respondent's business account that his so-called trust creditors consisted of approximately 15 creditors, some of which are clearly personal creditors;
- (c) in paragraph 36 he admits that Ms Radebe's funds are no longer in his trust account as he transferred those funds into his business

account “about” July of 2010, after he and Ms Radebe had negotiated settlement of the dispute wherein she indicated that she would accept R250 000, which money the respondent allegedly kept available in his business account for transfer in anticipation of the settlement of the dispute. There is a suggestion in the papers that this amount was the R255 000,00 transfer from the respondent’s trust account to his business account reflected on the 7th July, 2010. (Not only do the amounts not co-incide, but according to the uncontradicted Inspection Report, there was thereafter a transfer of those moneys from the respondent’s business account to his savings account!); and

- (d) in paragraph 38 he admitted that Ms Radebe’s funds have never been paid to her and he alleges that it is because of the ongoing fee dispute between him and herself (including her attorneys).

[6] The respondent’s trust account appears from pages 52 – 71 of the record and covers the period from the 10th June, 2009 to the 27th September, 2010. It is significant that as at the 6th July, 2009 when the RAF paid over the proceeds of Ms Radebe’s claim the balance was R45 196,82. Thereafter there are a significant number of small withdrawals or transfers from the trust account to the respondent’s business account. Those amounts are almost all in round figures such as R2 000, R4 000, R5 000, R8 000, R10 000, R20 000. On the 29th September, 2009 there is a transfer to his business account of R200 000.

Another significant aspect of the respondent's trust account is that after the 6th July, 2009 the balance in the trust account continuously diminishes until the 4th August, 2009. At that stage the balance was R245 293,82. Thereafter a further payment was received from the RAF of R183 348, and then the balance reduced with smaller payments being received from the RAF until a position was reached on the 1st February, 2010 when the trust account contained a total of R96, 78.

[7] It is thus clear that at that stage Ms Radebe's monies were not in his trust account. There is no indication anywhere in his trust account of a transfer of Ms Radebe's monies to his business account. There is no logical reason why he should have done so in bits and pieces over an extended period of time. The evidence revealed by the trust account is in clear contradiction to what the respondent states in paragraph 18 of his answering affidavit

[8] The evidence disclosed by his trust account is also in contradiction to his statement in paragraph 36 of his answering affidavit that he had transferred the funds into his business account about July 2010 after a settlement of the dispute had been negotiated. Whilst various monies were transferred from the respondent's trust account to his business account during July of 2010, there is no amount, or even a combination of amounts, which could correspond either to the amount of Ms Radebe's settlement figure, or to that amount less an allowance for costs.

[9] In addition to the foregoing the reasons which have been tendered by the respondent for not paying over the funds to Ms Radebe are unacceptable. He has no right whatsoever to accept instructions from any other person with regard to the disbursement of those funds, and any suggestion that he may not have paid her because of the interference of her relatives is not an acceptable excuse. In addition, his suggestion that he did not pay the monies over to her because of the fee dispute is unacceptable. There is no acceptable reason given by the respondent why he could not have paid over to her the undisputed monies – i.e. the amount paid over by the RAF less, on the respondent's own version, the maximum which he could have claimed for fees being 25% of that amount. In addition to the foregoing it is disquieting that the respondent at no stage proffered an acceptable explanation of why he did not pay over Ms Radebe's funds. The conclusion seems inescapable that he did not do so because he was unable to pay over the funds, having spent them.

[10] It is also disquieting that the respondent did not comply with the requests of the applicant to provide ledger records of Ms Radebe's account. His explanations for not being able to do so seem contrived and unacceptable. His refusal to hand over the file to new attorneys acting for Ms Radebe because the matter had been finalized was both untrue and unacceptable.

[11] In all the circumstances it is clear from a perusal of the papers that the respondent unlawfully misappropriated the amounts paid to him by the RAF on

behalf of Ms Radebe. His offence in so doing is compounded by his patently disingenuous efforts to explain his conduct in his affidavits and correspondence.

[12] In all the circumstances there is no reason why an order should not be granted as sought by the applicant.

[13] I accordingly grant a final order in terms of paragraphs 1.1 – 1.12 of the draft order prayed contained at pages 89 – 96 of the indexed papers.

Seegobin J : I agree.

Counsel for the Applicant : R M van Rooyen (instructed by Venn Nemeth & Hart Inc)

Counsel for the Respondent : S Madikizela (instructed by M M Fobo &

Associates)

Date of hearing : 11th February 2011

Date of judgment :