IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 2827/2017
DATE HEARD: 08/08/2018
DATE DELIVERED: 28/08/2018

In the matter between

THE LAW SOCIETY OF THE CAPE OF GOOD HOPE **APPLICANT**

and

ANDREW SHAUN MASIMLA **RESPONDENT**

JUDGMENT

ROBERSON J:-

[1] The applicant law society has applied for an order interdicting the respondent from practising, pending an application to remove his name from the roll of attorneys. Further relief claimed includes the appointment of a curator to whom the respondent is to deliver his books of account, records, files and documents. The respondent opposed the application.

[2] The application is founded on the alleged misconduct of the respondent in relation to his former clients, Mr E P and Mrs B Cunningham. Mr Cunningham was seriously injured in a motor vehicle collision and is confined to a wheelchair. The respondent was instructed to institute proceedings against the Road Accident Fund

(the Fund) for the recovery of damages suffered by Mr Cunningham. It is common cause that summons was issued and the Fund eventually settled the claim in the total sum of R3 531 119.36, paid to the respondent as follows: R173 515.20 on 6 January 2012, R960 000.00 on 15 February 2012, and R2 397 604.16 on 23 April 2013. It is further not in dispute that the respondent has paid over to Mr Cunningham the sum of R1 139 880.00. The respondent's explanation for the failure to account fully to Mr Cunningham is that from time to time Mr Cunningham loaned him monies from the proceeds of the claim. According to an acknowledgment of debt signed by the respondent on 24 July 2015, the total amount still due to Mr Cunningham was R1 396 603.00. I shall deal with the terms of this acknowledgment of debt in more detail later in this judgment.

[3] There were three grounds on which the applicant based its application: a failure by the respondent to account fully for the proceeds paid to him by the Fund; the fact that he borrowed money from a client; and the terms of two contingency fee agreements entered into between the respondent and Mr and Mrs Cunningham respectively.

[4] The complaint to the applicant was made by the Cunninghams' present attorney, Mr Victor Skelton. The gist of the complaint was that the respondent had failed to account to his client and when pressed for payment had entered into a loan agreement with his client. Mr Skelton also indicated that he had been instructed to recover the amount still owing by the respondent and that a criminal case was being investigated in relation to the loss suffered by the Cunninghams.

[5] An affidavit from Mrs Cunningham was filed in reply in this application and it is convenient to refer initially to this affidavit which contains a full history of the Cunninghams' dealings with the respondent up to the time that the complaint was made to the applicant.

[6] Mrs Cunningham is unemployed and takes care of her husband. She is paid R5 000.00 a month to do so.[1] Mrs Cunningham said that she primarily dealt with the respondent because she was more mobile than her husband. After the initial instruction to the respondent, and prior to payment by the Fund, the respondent lent them a few small sums of money because they were in need of financial assistance. In February 2012 the respondent informed them that he had received R960 000.00 from the Fund in settlement of part of the claim (it is common cause that this was for general damages) and that he would keep the money because the claim was not finalised, and because unscrupulous persons might take advantage of them. He also said that he could not pay out the money because a curator *bonis* had to be appointed. The respondent said that he would assist with their living expenses and further told them that R100 000.00 would be invested. Mrs Cunningham signed a document in relation to this investment but did not receive a copy.

[7] At the request of the respondent, Mrs Cunningham opened a bank account. During the period from 2012 to 2017 the respondent made a number of payments into the bank account and also paid Mrs Cunningham some amounts in cash. Mrs Cunningham compiled a list of all the payments made by the respondent. As stated above the total of the payments was R1 139 880.00. The list was annexed to Mrs

[1] Presumably this payment is made by the Fund in terms of s 17 (4) (a) of the Road Accident Fund Act 56 of 1996.

Cunningham's affidavit and reflected a total of 63 payments ranging from R100.00 to R500 000.00.

[8] On 26 April 2013, during a consultation, the respondent told the Cunninghams that the claim for loss of future income had been settled in the sum of R2 397 604.16 and that Mr Cunningham would "walk away" with about R1 million. Mrs Cunningham thought that this was too little, in view of the total amount paid by the Fund. The respondent showed Mrs Cunningham a letter from the Fund in which it was stated that a curator had to be appointed for Mr Cunningham and told her that he could not pay the money to her. However, at her request, he paid them R500 000.00, for the purchase of a house. Further during this consultation the respondent asked Mrs Cunningham for a loan of R300 000.00 but she declined. The respondent said to her that he had helped her and her husband when they were in need and that they should now help him. He would continually tell them that he had lifted them out of the gutter and that they should be grateful.

[9] There seemed to be no progress in the appointment of a curator *bonis* and on enquiry the respondent told Mrs Cunningham that Advocate Booi was to be appointed. At her request the respondent said he would arrange a meeting with Advocate Booi but later told her that Advocate Booi had died.

[10] The respondent continued to make payments into the Cunninghams' bank account and also made some payments in cash. Mrs Cunningham said she had to beg the respondent for money and that he would make excuses for why he was not paying.

[11] One evening he arrived at their home and reported that he had financial problems and that his office had been raided. He did not have the money to pay them and was not able to say what had happened to the money received from the Fund. He told Mrs Cunningham that she should help him as he had helped her and her husband. She told him that they were struggling financially and needed the money. He said he wanted to borrow money and would make regular payments to them.

[12] On 23 July 2015 the respondent arrived at their home with a document which reflected that he would pay them R810 218.00 in instalments of R6 500.00 per month and R50 000.00 every quarter. Mrs Cunningham told him that this amount was too little and that according to her the correct amount was R1 396 602.00. She reached this amount by deducting 25% from the two payments paid to the respondent by the Fund, and further deducting the payments he had made into the bank account and in cash.[2]

[13] The next evening the respondent came to their home with two acknowledgements of debt, one for R1 396 603.00 and the other for R810 218.00. He told her that she should sign both agreements and that the one for the lesser amount was for accounting purposes only. Mrs Cunningham agreed to sign both agreements because she and her husband were in dire financial need. Both agreements were annexed to the applicant's founding affidavit. They were identical in their terms except for the amount for which the respondent was indebted. They

[2] The 25% would have been the fee to which she assumed the respondent was entitled, in terms of the contingency fee agreements mentioned in paragraph [3] above. The contents of these agreements will be dealt with later in this judgment.

recorded that the agreement was between the respondent as debtor and Mrs Cunningham as creditor. They provided for nil interest on the debt and repayment was to be made in monthly instalments of R6 500.00 and quarterly instalments of R50 000.00. The one for the lesser amount was dated 24 July 2015 (the pre-typed year 2012 was deleted and replaced with 2015) and the one for the greater amount was undated but the year was pre-typed as 2012. The signature of the creditor on both agreements was "E Cunningham". Mrs Cunningham said that the respondent told her to sign as E Cunningham. Mrs Cunningham said that at no time prior to signing the agreements had she or her husband agreed orally or in writing to lend any money to the respondent.

[14] According to Mrs Cunningham the respondent did not pay in terms of the agreement and during October 2015 she learned from the Fund precisely what it had paid to the respondent. She discovered that in addition to the two amounts of which they had been informed by the respondent, the Fund had also paid to the respondent the sum of R173 515.20. The respondent had not told them of this payment.

[15] Mrs Cunningham eventually served a "notice of breach of contract" on the respondent, putting him on terms to pay the balance of the September 2015 instalment and the October 2015 instalment, failing which the full amount would be called up, as provided for in the acknowledgement of debt.

[16] Mrs Cunningham estimated that by deducting 25% from the total payment from the Fund for the respondent's fees, as well as deducting the total payments received from him, the respondent still owed R1 508 459.52. Mrs Cunningham

stated that the respondent had never accounted to them for the payments he received from the Fund, his disbursements or his fees.

[17] The founding affidavit was deposed to by a councillor of the applicant, Mr Likhaya Makana. The applicant received Mr Skelton's complaint on 5 February 2016. Mr Skelton informed the applicant that he had written to the respondent requesting a detailed statement of account and a copy of the fee agreement, but had received no response.

[18] On 17 February 2016 the applicant wrote to the respondent informing him of the complaint and requested his response by 17 March 2016, such response to include relevant documents and accounting records. No response was received. On 16 May 2016 the applicant addressed a reminder to the respondent requesting him to respond by 27 May 2016. On 27 May 2016 the respondent telephonically requested an extension of time in which to respond. He advised that his office had been broken into and his computers had been stolen. An extension was granted until 13 June 2016. On 14 June 2016 the respondent requested, and was granted, a further extension to 27 June 2016. On 27 June 2016 the respondent requested a further extension for two weeks. The applicant declined this request and informed the respondent that his response was expected by 1 July 2016. On 1 July 2016 the respondent informed the applicant that he could not comply with its request for a response to the complaint for the reasons already provided, namely the break-in and theft of his computers. The respondent was informed that if he did not provide his response the complaint would be referred to the applicant's disciplinary committee. This was duly done.

[19] On 16 August 2016 the disciplinary committee recommended that the applicant be authorised to uplift the Cunningham file and accounting records from the respondent and this recommendation was confirmed by the applicant's Council. On 21 September 2016 the applicant informed the respondent of the ruling and the respondent replied that he was not in a position to discuss the matter and that the applicant should contact him on 23 September 2016. When asked if he was in possession of the Cunningham file the respondent repeated that he was not in a position to discuss the matter.

[20] On 27 September 2016 the applicant emailed the respondent asking him to advise if he would make his file and accounting records available. There was no response to this email. The decision was then taken to apply for an order interdicting the respondent from practising pending an application to remove his name from the roll.

[21] The respondent filed an answering affidavit and a supplementary affidavit in which he responded to Mrs Cunningham's affidavit and the applicant's replying affidavit. He stated that the Cunninghams had previously appointed two firms of attorneys before approaching him, and had terminated the services of those attorneys. Following the instruction to institute a claim against the Fund, he entered into separate contingency fee agreements with Mr and Mrs Cunningham. These agreements were annexed to his affidavit. Clauses 6 and 7 of these agreements provided as follows:

> "6. The parties agree that if the Client is successful in the aforementioned proceedings an amount shall be payable to the attorney, equal to 25% of the Capital plus VAT.

Nota Bene: If the success fees are higher than the Attorney's normal fees, such higher fee may:

- No (sic) exceed the Attorneys normal fees by more than 100%; and
- In the case of a claim sounding in money, not exceed 25% of the total amount awarded or any amount obtained by the client in consequence of the proceedings.

  For the purposes of calculating the higher fee, costs are not included.

7. The parties agree that:

   7.1 If the client is partially successful in the aforementioned proceedings the Client shall owe the Attorney an amount equal to 25% of the Capital plus VAT;

   7.2 In the event of the premature termination of this Agreement for any reason, the Client shall owe the Attorney an amount calculated by drafting an attorney own client bill of costs, drafted on the highest no-litigious (sic) basis and scale."

[22] As pointed out by the applicant in reply, these agreements were in conflict with the Contingency Fees Act 66 of 1997.[3] The respondent denied that the agreements did not comply with the provisions of this Act. With regard to the fact that he entered into a contingency fee agreement with Mrs Cunningham when she was not the plaintiff in the action, he said that he took instructions from Mr Cunningham. He further said that the Cunninghams' previous attorney had caused Mrs Cunningham to sign a contingency fee agreement and power of attorney and that he (the respondent) had requested Mr Cunningham to sign the contingency fee agreement and a power of attorney.

[3] Section 2 (2) of the Act provides:
"Any fees referred to in subsection (1) (b) which are higher than the normal fees of the legal practitioner concerned (hereinafter referred to as the 'success fee'), shall not exceed such normal fees by more than 100 per cent: Provided that, in the case of claims sounding in money, the total of any such success fee payable by the client to the legal practitioner, shall not exceed 25 per cent of the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned, which amount shall not, for purposes of calculating such excess, include any costs."
There are several authorities dealing with the cap of 25%. See for example *Mfengwana v Road Accident Fund* 2017 (5) SA 445 (ECG) and the authorities referred to therein.

[23] The respondent agreed that he had lent money to Mrs Cunningham from time to time, prior to settlement of the claim by the Fund. He and the Cunninghams became personal friends and in order to assist them he acted beyond the usual attorney and client relationship.

[24] He denied telling Mrs Cunningham that he would keep the R960 000.00 until the matter was finalised, and said that the Cunninghams had instructed him not to pay them at this stage but rather to account when the matter was finalised. He denied not telling them about the payment of R173 515.20. He further denied saying that Mr Cunningham would "walk away" with R1million. He told them that the loans he had made to them and his contingency fee had to be deducted and that he would account fully to them.

[25] The respondent denied the allegation of an investment of R100 000.00 and said that the Cunninghams had instructed him to invest R300 000.00 on their behalf, via the agency of Naidoo & Paulsen Attorneys. The respondent annexed an "Investment Agreement" to his affidavit, apparently concluded between Mr Cunningham and Naidoo & Paulsen Attorneys, in terms of which the attorneys were to invest R300 000.00 on which interest would accrue at the rate of R3 000.00 per month. The investment was for a fixed term of six months and at the end of that period the total interest earned would be R18 000.00, and R318 000.00 would be payable to Mr Cunningham. The respondent annexed to his supplementary affidavit an extract from Mrs Cunningham's book in which she recorded payments made by the respondent. One of the items read "February 23 sign investment R300 000.00". The respondent also annexed an entry in his trust account bank statement which

reflected a payment of R300 000.00 to Naidoo & Paulsen Attorneys. In answer to the applicant's allegation that the respondent had not provided proof that the R318 000.00 had been paid to him, he annexed a further extract from his trust bank account statement which reflected a credit of R318 000.00 on 19 November 2012 with the description "Acb Credit Cunningham".

[26] The respondent agreed that he made payments to the Cunninghams from time to time, either on their instructions or in terms of agreements with them. He denied that Mrs Cunningham had to beg for money. He denied that he had asked Mrs Cunningham for R300 000.00 and said that the only money he had asked from them was the amount referred to in the acknowledgment of debt, namely R1 396 603.00. This agreement was orally concluded in 2012, long before it was reduced to writing, because at that time he and the Cunninghams enjoyed a good relationship. The terms of the agreement were that Mr Cunningham would lend him money from time to time from the proceeds of the Fund's payments. The respondent was required on each occasion to specify the amount to be loaned. The respondent and Mrs Cunningham kept a record of all these amounts and the acknowledgment of debt was prepared on the basis of these records. The respondent was to make repayment from time to time from his practice income. Before he borrowed the money, the matter was thoroughly discussed between them. Even though he could have approached a financial institution to assist him and his practice, the Cunninghams told him not to because he was the only person who had assisted them, their former attorneys having failed them. He said that the money he borrowed was not to support a lavish lifestyle but to advance his practice. He specifically denied that his appropriation of the money was without the

Cunninghams' consent. He made repayments from time to time and he and Mrs Cunningham reconciled the outstanding amount when the acknowledgment of debt for R1 396 603.00 was signed. Despite the wording of the acknowledgment of debt it was agreed that the first quarterly payment of R50 000.00 would be made at the end of December 2015.

[27] The respondent did not deny that he had gone to the Cunninghams' home and had told them that he was in financial difficulties and that he was at that time not able to repay them. He denied telling them that he did not know what had happened to the money received from the Fund. He agreed that Mrs Cunningham had complained about their financial position. With regard to the two acknowledgments of debt which were signed, the respondent said that he and the Cunninghams had first agreed that the amount borrowed was R810 218.00 but when he did his own calculations he realised that this amount was incorrect and informed them that the correct amount was R1 396 603.00. The Cunninghams thanked him for correcting this mistake. Although he said that Mrs Cunningham had signed both acknowledgments of debt, he denied telling her to sign as E Cunningham.

[28] Following the opening of the criminal case, Mrs Cunningham contacted the respondent several times. He was surprised at this contact because it was not allowed. He thereafter was contacted by the investigating officer who asked why he had contacted Mrs Cunningham and why he had paid in terms of the acknowledgment of debt. This query was cleared up when Mrs Cunningham admitted contacting him. Mrs Cunningham said that she would withdraw her complaint against him if he continued to pay in terms of the agreement and further

that she had never instructed the applicant (I think he meant to say she had never instructed Mr Skelton) to report him to the applicant but only to recover the monies owing. The respondent stopped paying in terms of the agreement for fear of being accused of interfering with State witnesses. However, in January 2017 Mrs Cunningham requested him to make a monthly payment. He did so after his attorney consulted the investigating officer.

[29] As far as the appointment of a curator *bonis* was concerned, the respondent agreed that no curator had been appointed. The offer from the Fund was subject to the appointment of a curator *bonis*. He discussed such an appointment with the Cunninghams and they instructed him not to proceed with it. Instead they would lend him the money he needed for his practice. Documents were drafted for such an appointment but Mrs Cunningham contacted the psychologist who had recommended the appointment of a curator *bonis* and asked him to change his recommendation. The respondent did not deny that he told Mrs Cunningham that Advocate Booi was to be appointed as curator.

[30] The respondent maintained that he had responded to Mr Skelton's letter (see paragraph [17] above. On 8 February 2016 he sent an email to Mr Skelton stating that he was not in a position to reply on such short notice and would revert. The respondent did not deny that he had not responded to the applicant's letter of 17 February 2016. He admitted the request for extensions and said that he could not respond to the specific allegations because of what had taken place at his office (presumably the break-in and theft). The Cunninghams' file had gone missing during the break in. It was difficult for him to reconstruct the contents of his file without the

necessary information. After the break-in he had to go through all his files in order to reconstruct them. Matters were made worse by the loss of his computers. Further, for a period of eight to nine months he had not been able to practise because of an incident which took place in his office between him and the husband of a former employee. It appears from correspondence annexed to the respondent's supplementary affidavit that this person had refused to return, and had threatened to damage, the respondent's laptop which contained confidential and critical financial data. In his letter to the applicant dated 2 March 2015 the respondent gave this incident as an explanation for his outstanding 2014 audit report. He informed the applicant that the laptop had since been returned and the necessary documents were available for auditing.

[31] The respondent agreed that on 21 September 2016 he had asked the applicant's official to contact him on 23 September 2016 but she did not do so. He further said that he had replied to the applicant's email of 27 September 2016. This was by way of an email dated 10 November 2016 in which he informed the applicant that he had instructed an attorney on his behalf and that the applicant should contact his attorney. In answer to the allegation that he had not dealt squarely with the allegations against him and had not produced his trust bank account records which would support his resistance to the allegations, the respondent said that the applicant had not requested these records.

[32] The respondent maintained that he had fully accounted to the Cunninghams. He further maintained that because the applicant had issued him with a fidelity fund

certificate for every year in which he has practised, this was proof that he was a fit and proper person to practise.

[33] The three grounds on which the application is based are interlinked and I think it is appropriate to approach the evidence as a whole, without considering each ground separately. Before doing so it is first necessary to deal with the chief disputes of fact, namely whether or not the Cunninghams had orally agreed during 2012 to lend money to the respondent from the proceeds of the claim, whether or not they instructed him to keep the R960 000.00 until the matter was finalised, and whether or not he instructed Mrs Cunningham to sign the acknowledgments of debt as E Cunningham.

[34] In the matter of *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at paragraph [26] the following was said (footnotes omitted):

> "It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."

[35] In my view the respondent's version that the Cunninghams agreed to lend him money from the proceeds of the claim can be rejected as far-fetched and palpably implausible. It was not in dispute that the Cunninghams needed the money. Mrs Cunningham was unemployed and judging from the size of the payment for loss of future earnings, Mr Cunningham was not earning an income, or at least not earning

very much now that he was incapacitated. The payments from the Fund would have been their means of survival. It is simply not credible that people in their position would part with such a large sum of money.

[36] Other than saying he was loaned amounts from time to time and made repayments, the respondent gave no details of what these amounts were or how much he had repaid. He would have been in a position to do so because according to him he had kept a record and utilised these records when agreeing the amount of R1 396 603.00. This was after the alleged break-in at his office.

[37] A further difficulty for the respondent with regard to these alleged loans is that they do not explain why the respondent did not account to the Cunninghams as and when payments were received from the Fund. The arrangement could not continue indefinitely and the respondent did not deal with his failure to account from the time the monies were received until the time the acknowledgment of debt was signed in 2015. If he was borrowing and repaying sporadically, there was nothing preventing him from accounting to the Cunninghams for the very large amounts of money he had received from the Fund.

[38] I am further of the view that the respondent's evidence that the Cunninghams told him to keep the R960 000.00 until the matter was finalised is equally far-fetched, for the same reasons, namely that the Cunninghams were in need of the money. In any event the respondent did not account to them after he received the payment for loss of future earnings. Similarly, his assertion that the Cunninghams chose to lend

him money rather than allow the money to be protected by a curator *bonis*, is to be rejected on the same grounds.

[39] Effectively the respondent did not answer the allegations against him when he was in a position to do so. (See *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] 2 All SA 512 (SCA) at paragraph [13].) I conclude that Mrs Cunningham's evidence in relation to these key factual disputes, is to be accepted.

[40] The signing of the acknowledgement of debt by Mrs Cunningham is to be considered in the light of this conclusion. Mrs Cunningham said she did so because she was in dire need of money and that the respondent told her to sign as E Cunningham. The respondent's response was a bare denial. This is no answer. The respondent drew up the acknowledgment of debt. Mrs Cunningham was named as the creditor. From her point of view there would be no reason to sign in her husband's name. The respondent was in the position where he now had to come clean with the Cunninghams about not accounting to them for all the money received and his way of doing so was to confess his financial difficulties and to draw up an acknowledgment of debt. He would have known, as an attorney, that he was indebted to Mr Cunningham and not to Mrs Cunningham, and that Mrs Cunningham had no authority to sign the acknowledgment of debt. Mrs Cunningham's assertion that he told her to sign as E Cunningham is far more consistent with this scenario. I therefore accept Mrs Cunningham's account of the circumstances in which the acknowledgment of debt was signed.

[41] Having reached these conclusions, I now consider the respondent's conduct throughout his dealings with the Cunninghams, as well as his responses to the applicant after they received the complaint from Mr Skelton.

[42] After the receipt of the payments from the Fund the respondent did not account to the Cunninghams. Instead he made payments to them from time to time. It is instructive that one of these payments was for an oil service, another for a car service, and yet another for school fees. As already mentioned, a number of payments were in cash. Such payments are consistent with Mrs Cunningham's evidence that she had to ask the respondent for money. In the light of my rejection of the respondent's version concerning the loans, the most reasonable inference to draw from these intermittent payments and the failure to account, is that the respondent was using the monies he retained for his own purposes. He kept the Cunninghams on a string for three years with his false explanation about accounting to them when the matter was finalised. He exploited their trust and belief in him. This exploitation reached its nadir when he provided for a nil interest rate in the acknowledgment of debt. Further, there was an element of deceit in telling Mrs Cunningham to sign the acknowledgment of debt in her husband's name.

[43] Even if Mrs Cunningham had authority to sign the acknowledgment of debt, the circumstances were such that her signature was effectively under protest because of the need for the money. It is in any event unethical for an attorney to borrow money from a client (see *Law Society of the Northern Provinces v Dube* [2012] 4 All SA 251 (SCA) at paragraph [21]) but the respondent's conduct in relation to this particular loan, if the acknowledgement of debt was a valid agreement, was

grossly unethical, bearing in mind the desperation of the Cunninghams and the nil interest rate.

[44] The respondent continued his deception after the complaint was made to the applicant. Instead of immediately telling the applicant that he had borrowed money from the Cunninghams and had suffered a break-in and could not account for the payments made to him by the Fund, he stalled. It was only in May 2016, some three months after the initial letter from the applicant, that he mentioned the break-in and theft. The alleged loans from Mr Cunningham only emerged in the papers in this application. If everything was above board, as he maintained, why would he not disclose the loans and the acknowledgment of debt immediately? I am of the view that he evaded the applicant for as long as he could. Even if his evidence of the theft and missing file was correct, although it is strange that he was able to produce the contingency fee agreements, he could have consulted his trust and business bank accounts. His response that he was never asked for his trust bank account records is disingenuous, to say the least. If he had accounted to the Cunninghams and taken his contingency fee, as he said he told them he would, he would have debited fees and there would have been corresponding transactions in his trust and business accounts. He was able to produce extracts from his trust bank account statements, thereby demonstrating that he has access to these records. The fact is however that he has not accounted to the Cunninghams. He did not produce a statement of account setting out fully the amounts received from the Fund, his fees and his disbursements.

[45] With regard to the contingency fee agreement, it is so that a court may set aside an invalid contingency fee agreement, and the conduct of the attorney in entering into such an agreement does not necessarily mean that the attorney is guilty of misconduct. However in the present case the respondent was alerted to the invalidity of the agreement by the applicant's replying affidavit. Yet he failed to disclose how his fee was calculated when he must have known whether or not he debited 25% of the award or his usual fee plus 100%. He did not need his file to explain how he calculated his fee. In the circumstances it was incumbent on him to say how he calculated his fee. He failed to do so, nor did he respond specifically to Mrs Cunningham's deduction of 25% for his fees when she calculated the outstanding amount. This is a further example of his evasive conduct. Yet a further related example was his failure to disclose whether or not he received a payment from the Fund for party and party costs and how this was included in his accounting. He would have been able to provide this information.

[46] Overall the respondent's conduct was dishonest in relation to the Cunninghams, and at best evasive in his responses to the applicant. In this application he has persisted in a false explanation for not paying to Mr Cunningham what was due to him, and has failed to disclose information and answer allegations when he was in a position to do so.

[47] In an application to interdict an attorney from practising pending an application to remove his name from the roll, the applicant is seeking final relief. (See *The Law Society of the Cape of Good Hope v Nompozolo* Eastern Cape Division, Grahamstown High Court, case number 624/09, judgment delivered on 3 September

2009, at paragraph [15].) The applicant must therefore establish the requirements for a final interdict, namely a clear right, an injury actually committed or reasonably apprehended, and no other suitable remedy. (*Nompozolo* at paragraph [15].)

[48] I consider now whether or not the applicant has established these requirements.

[49] Clear right

The applicant is not an ordinary litigant in matters such as the present one. In *Solomon v Law Society of the Cape of Good Hope* 1934 AD 401 at 409 the following was said:

> "The Law Society protects the interests of the public in its dealings with attorneys. It does not institute any action or civil suit against the attorney. It merely submits to the court facts which it contends constitutes unprofessional conduct and then leaves the court to determine how it will deal with this officer."

[50] In my view the applicant has, in its capacity so described, established a clear right, namely the right to intervene and approach the court in order to prevent injury to the public, such as that suffered by the Cunninghams.

[51] Injury committed or reasonably apprehended

The respondent's conduct in relation to Mr Cunningham's claim demonstrates that he is not a fit and proper person to practise. His assertion that the issue of Fidelity Fund certificates prove that he is a fit and proper person to practise carries no weight and does not negate his conduct. His persistence in this application with a false explanation for failing to account to the Cunninghams, his failure in this application to disclose information when he was in a position to do so, and his evasive conduct

towards the applicant, all demonstrate in my view that there is a reasonable apprehension that such conduct might be repeated, putting the public at risk.

[52] No other suitable remedy

Clearly the applicant has no other remedy in these circumstances.

[53] With regard to the intended application to remove the respondent's name from the roll, I think it appropriate to impose a time limit for the launching of such application. This is because in the founding affidavit Mr Makana noted that, although it was reasonably believed that the respondent had rolled trust money and failed to maintain accurate trust account records, the applicant had yet to obtain possession of his accounting records.

[54] The following order will issue:

[54.1] An order is granted in terms of prayers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 of the notice of motion.

[54.2] The application to remove the respondent's name from the roll of attorneys is to be launched within three months of the date of this order.

[54.3] The applicant may, if required, apply to this court on notice to the respondent for an extension of the three month period.

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J M ROBERSON
JUDGE OF THE HIGH COURT

PICKERING J:-

I agree

_____
J D PICKERING
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv K Watt, instructed by NN Dullabh & Co, Grahamstown

For the Respondent: Adv H van der Linde SC, instructed by Swarts Attorneys, Port Elizabeth