IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 52448/2014

52448/14

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES Applicant

9/12/2014

and

AUPER KLAAS KHOZA Respondent

JUDGMENT

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED
DATE 8/12/14 SIGNATURE

DAVIS, AJ

PARTIES:

[1] The Applicant is the Law Society of the Northern Provinces (incorporated as the Law Society of the Transvaal) in terms of Section 56 of the Attorneys Act, No. 53 of 1979 ("*the Attorneys Act*") and its predecessors.

[2] The Applicant's *locus standi* to bring the application stems from the Attorneys Act and the Rules promulgated in terms of Section 74 thereof. In terms hereof the Applicant has the duty to maintain and enhance the status and dignity of the attorneys' profession, to regulate the conduct of practitioners and to exercise disciplinary jurisdiction over all practitioners which includes, in appropriate cases, the right and duty to approach the court in terms of Section 22(1)(d) of the

Attorneys Act for an order for the striking off the roll or suspension from practice of a practitioner.

[3] As has become customary in applications of this nature, a substantial part of the founding affidavit deposed to on behalf of the Applicant has been devoted to setting out the duties of the Applicant and the nature of an attorney's practice and the duties and obligations of a practitioner.

[4] The Respondent has been admitted as an attorney of this court on 24 June 1986 and his name is still on the roll of attorneys. For the past 17 years, the Respondent has been practising as the sole practitioner for his own account at Krugerpark Main Road "*next to Sanbonani Bridge, Hazyview, Mpumalanga ...*" in a rural area about 5 km from the border of the Kruger National Park.

PRECEDING PROCEDURAL STEPS:

[5] The Applicant's application was initially launched as an urgent one, served on 18 July 2014 and to which the Respondent had answered by 25 July 2014.

[6] On 12 August 2014 this court suspended the Respondent from practice on an urgent basis with a return date of 7 November 2014 whereupon the Respondent was called upon to show cause why his name should not be struck from the roll of attorneys.

[7] The Respondent applied for leave to appeal against this order which leave to appeal was heard on 15 September 2014 and dismissed.

[8] The matter came before us on the aforementioned return day and we were faced with a belated but substantial answering affidavit delivered only on 23 October 2014 (and to which the Applicant had, briskly and on short notice, replied).

[9] The Respondent's initial answering affidavit was clearly done on short notice and was cursory to say the least. For this reason and, in the interests of justice and despite the lateness of the subsequent answer (and even later practice note and heads of argument) condonation insofar as was necessary was granted in respect of the late delivery of documents and we heard the matter.

CHARGES AGAINST THE RESPONDENT:

[10] With reliance on a report and confirmatory affidavit of a chartered accountant, P Mapfumo who had conducted certain investigations at the Respondent's practice, the Applicant alleged that:

> "*9.1 The Respondent misappropriated trust funds.*
>
> *9.2 There is a trust deficit in the Respondent's book-keeping.*
>
> *9.3 The Respondent delayed payment of trust funds to clients.*
>
> *9.4 The Respondent failed to account to clients.*
>
> *9.5 The Respondent effected irregular transfers from his trust banking account to his business banking account.*
>
> *9.6 The Respondent failed to keep proper accounting records in respect of his practice.*
>
> *9.7 The Respondent failed to regularly and promptly update his accounting records.*
>
> *9.8 The Respondent effected cash withdrawals directly from his trust banking account.*

9.9 The Respondent failed to ensure that his trust cheques were drawn in compliance with the provisions of the Law Society's rules.

9.10 The Respondent contravened several provisions of the Attorneys Act and the Law Society's rules relating to bookkeeping by attorneys.

9.11 The Respondent placed his trust creditors and the Attorneys Fidelity Fund at risk; and

9.12 The Law Society has received serious complaints against the Respondent."

[11] As can be seen from the aforesaid charges, they are wide-ranging. The papers are also voluminous and exceed 300 pages. It is not necessary to deal with each and every allegation contained in them but, for purposes of adjudicating this matter, it is crucial to deal with the following aspects:

11.1 At the time of the inspection of the Respondent's books, his trust account showed a deficit of R32 421,00. This amount could not be attributed to any particular trust creditor and one of the explanations furnished by the Respondent was that, for a substantial period of time, his banker had erroneously debited banking charges against the trust account. He has since taken

steps and the moment that his trust account is "*unfrozen*" his bankers will rectify the position.

11.2 The existence of a deficit on a trust account constitutes a contravention of Section 78(1) of the Attorneys Act read with Rule 69.3 thereof in that the practitioner has failed to ensure that the total amount in his trust banking account was not less than the total amount of credit balances of his trust creditors.

11.3 The Respondent could not exactly explain how this deficit arose, apart from the issue of banking charges, but stated that the nearest town, where his bookkeeper practises, is at Nelspruit which is approximately 60 km from his practice. He further stated as follows in respect of his bookkeeping:

> "*I have been using the same manual bookkeeping system since 1986, in the way that I was taught during my studies and when I did my articles of clerkship and I have always accepted that it was in order because there were never any complaints laid against me before the complaints relating to this application.*"

11.4 This allegation is substantiated by the fact that the Respondent was every year furnished with a clean audit record by his

auditors and pursuant to which the Applicant has annually issued the Respondent with the necessary Fidelity Fund Certificate.

11.5 A substantial set of accusations against the Respondent is that the Road Accident Fund had erroneously (by its own admission) paid some R82 600,00 to the Respondent and that he had delayed inordinately in repaying the amount. In fact, the amount was only repaid in full subsequent to the previous hearing. The payments by the Road Accident Fund constitute a curious set of facts: They constitute five payments of various amounts made during the period from 2004 to 2010. The Road Accident Fund however only at a late stage realised this and started making demands for repayment during the first half of 2012.

11.6 In his subsequent answering affidavit the Respondent deals with each of the payments and in respect of most of them explanations are given to the effect that the payment should have gone to his correspondents or that the client had passed away or that the payment was in a related matter in which the Respondent had not acted and the like. There is however no indication that in each of these, the Respondent was anything

else but the innocent recipient of the incoming payments from the Road Accident Fund.

[12] The Applicant contended that, despite the above, the Respondent had not kept the "*incoming funds*" from those erroneous payments sufficiently and readily available as trust funds. This, so the affidavits contend, is to be deduced from the dilatoriness in repaying these amounts by the Respondent when called upon to do so by the Road Accident Fund. This inference has, however, save what is stated hereinlater, not otherwise been canvassed.

[13] No other impropriety has been indicated save for the fact that, had the Respondent kept proper books, he should have noted these payments and the erroneous nature thereof and, in the instances where he had been obliged to repay, he should have done so timeously. The Respondent has rectified the position in that he had repaid all these amounts, despite in some instances some not being due.

[14] The Applicant also relied on the "*Saveca complaint*":

14.1 The Law Society had received a complaint from one R L Saveca on 16 October 2013. Saveca alleged that the Respondent had been instructed to lodge a claim against the

Road Accident Fund on behalf of her daughter during 2005, that the Respondent had been paid an amount of R22 000,00 and had never accounted to Saveca and failed to pay the proceeds of the claim to her.

14.2 The Respondent had responded to this complaint to the Law Society and to Ms Mapfumo by denying that he had ever received instructions from Saveca. He also furnished some detail in respect of this denial and the matter was not further pursued by the Law Society.

14.3 The answer by the Respondent however opened another can of worms. He explained that he had indeed received two payments of R22 000,00, both on 1 August 2008, one in respect of an RAF claim on behalf of one Harry Kubayi and one on behalf of Unice Lusbeth Matebula. Although the claims in respect of these two clients have been finalised and the necessary documentation regarding their claims and affidavits by the clients have been produced, the bank statement on which the Respondent relied, disclosed some reason for discomfort.

14.4 In the bank statement of the trust account for August 2008 the two individual payments for the aforementioned clients in the amount of R22 000,00 each are indeed reflected as having been paid on 1 August 2008. The Respondent's contention is that he had only accounted to Mr Kubayi on 2 June 2014 (in an amount of R12 500,00 as confirmed by an affidavit of Mr Kubayi) due to the fact that he had "*... lost contact with him and could not trace him because the company for which he worked in Bushbuckridge closed down and he found new employment in Germiston. I made every effort to trace him as ... explained in [the] original answering affidavit and eventually only got hold of him shortly before I accounted to him*".

14.5 Be the delay in payment as it may, then the amount due to Mr Kubayi of R12 500,00 should have remained as a trust credit in the Respondent's trust account. The aforesaid bank statement however ends on 12 August 2008 with a credit balance of only R6 645,30 (after subsequent credits of R1 993,77, R4 000,00 and two further deposits of R1 000,00 each). Clearly the amount with which the Respondent accounted to Mr Kubayi on 2 June 2014 (only) was not retained on the trust account as a trust credit for this trust creditor. This shortfall in respect of a receipt of incoming Road Accident Fund payments, gives some

credence to the Applicant's aforementioned inference referred to in paragraph [12] *supra*.

[15] A last set of complaints against the Respondent relates to the fact that he had drawn cheques in favour of clients without crossing them and by allowing them to be cashed at either the branch where his trust account was held or at other branches of his bankers. The Respondent furnished an explanation which, to my mind, indicates that the current formulation of the rules do not cater for the exigencies of practice in rural Africa. Laudable as the regulatory content of the particular rules are regarding payment from trust accounts, they are impractical in dealing with the circumstances faced by the Respondent: he explained that many of his Road Accident Fund clients are illiterate and indigent and do not possess bank accounts. The only way in which proceeds of their claims can be paid and received by them, is in cash. He had therefore arranged with his bankers that trust cheques can be cashed by such clients on sufficient proof of identity and he had also canvassed this aspect, if I understand his affidavit correctly, with his bookkeeper/auditor and received the go-ahead. The blameworthiness attached to this conduct which had clearly been to the benefit of his clients in the discharge of his obligations as an attorney, must therefore be seen in its proper context.

EVALUATION:

[16] It is trite that an application of this nature is in itself a disciplinary enquiry and *sui generis* in nature. There is no *lis* between the Law Society and the practitioner. The Law Society as *custos mores* of the profession, places facts before this court for its consideration. In this regard we have been referred to **Solomon v The Law Society of the Cape of Good Hope** 1934 AD 401 at 407, **Cirota and Another v Law Society, Transvaal** 1979(1) SA 172 (A) at 187H and **Prokureursorde van Transvaal v Kleynhans** 1995(1) SA 839 (T) at 851G-H.

[17] It is also now trite that the process of evaluation involves a three-stage enquiry:

17.1 The first enquiry is to establish whether the offending conduct has been established on a balance of probabilities.

17.2 The second enquiry is whether the practitioner is a fit and proper person to continue to practise.

17.3 The third enquiry is whether, in all the circumstances, the practitioner is to be removed from the roll of attorneys or whether another sanction would be appropriate.

See: **Jasat v Natal Law Society** 2000(3) SA 44 (SCA) at 51B-I.

[18] Having regard to the trust deficits, the manner in which the bookkeeping regarding the trust account has been done, as well as the other aspects referred to above, the offending conduct in respect of most of the charges against the Respondent have been established on a preponderance of probabilities.

[19] Regarding the issue of fitness to practise, which is a value judgment, it must be stated that it is clearly improper for a practitioner to deal with trust funds (and his trust account) in the manner in which the Respondent had done. Having said that however, I did not form the impression from the papers that the Respondent was a dishonest practitioner or had intentionally misappropriated trust funds or acted in such a manner that his clients had been deprived of funds lawfully due to them or that a risk for the Fidelity Fund existed. The value judgment at this stage of the enquiry and the declaration as to whether a practitioner is no longer a fit and proper person to practise also lies within the discretion of the court.

See: **Law Society of the Cape of Good Hope v C** 1986(1) SA 616 (A); and

Law Society of the Cape of Good Hope v Budricks 2003(2) SA 11 (SCA).

[20] Were the Respondent to continue to practise as he did, i.e. by continuing to operate his trust account in a manner and fashion which would result in trust deficits from time to time, then he would not be a fit and proper person to continue to practise. The indications are however that the offending conduct had been remedied and would in future be remedied (and should and must be eradicated). Were this so, then, in my view, the value judgment would be that the Respondent remains a fit and proper person to continue to practise.

[21] The facts set out in the judgment in **Law Society of the Cape of Good Hope v C**, *supra*, appear to be analogous to that of the Respondent, if not *in pari materia*, particularly when regard is had to the following portion of the judgment:

> "*The charge of theft and/or misappropriation of trust monies by overdrawing the fund's trust banking account and causing shortages and deficiencies therein was not proved. There was no theft in the usual sense. There were deficiencies from time to time, for which C must take responsibility. For him to blame Louw for not telling him that his books were in disorder was a shabby trick and an attempt to evade responsibility but in fact no monies were stolen and no clients suffered loss. There was*

a technical misappropriation but no actual loss to anyone. Nor was it shown that C meant to keep trust monies for himself... He was certainly guilty of extreme inefficiency and incompetence. His ineptitude was remarkable. But whether his conduct brought the profession as a whole into disrepute is another matter ... In view of the above, I am of the opinion that C's conduct, viewed as a whole, comes perilously close to justify his being struck off the roll. But I have some hesitancy about recommending so drastic a step at this moment. He certainly deserves strong censure; in fact appropriate disciplinary action going further than censure, but whether he deserves immediate removal from the attorneys' roll is perhaps debatable."

[22] In the present instance and, taking all the factors into consideration as well as the discretion with which this court is vested, I am of the view that the present Respondent deserves censure in the form of a sanction but not a removal of his name from the roll of attorneys.

ORDER:

[23] In the premises, the order I propose is the following:

1. The Respondent is suspended from practice for a period of 6 months calculated from date of the return day of the rule *nisi*, being 7 November 2014;

2. During the period of suspension, the provisions of the rule *nisi* granted on 12 August 2014 shall endure and remain operative;

3. The Respondent is ordered to pay the costs of the application.

N DAVIS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION
PRETORIA

I concur and it is so ordered.

FOURIE J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
PRETORIA
8/12/14