REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE: 24/8/2016

CASE NO: 69007/2015

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

…… ……
SIGNATURE **DATE**

THE LAW SOCIETY OF THE NORTHERN PROVINCES Applicant

and

MAPHUTI ROSINA KUBUANA Respondent

JUDGMENT

AC BASSON, J

[1] This is an application for the removal of the respondent (Ms Maphuti Rosina Kubyana) from the roll of attorneys of this court in terms of section 22 of the Attorneys' Act[1] (Part B) together with further ancillary relief as set out in Part B of the Notice of Motion. The application was heard by the urgent court on 14 October 2015. The court ordered that the respondent be suspended from practicing as an attorney pending the relief sought in Part B of the application for the removal of her name from the roll of attorneys. The Law Society submits that the respondent's name should be struck from the roll.

Background

[2] The respondent was admitted as an attorney on 29 July 2013 and her name still appears on the role. At all relevant times the respondent practiced as an attorney for her own account as a single practitioner under the name and style of Kubyana Attorneys in Benoni. The respondent closed down her practice on 12 January 2015.

[3] It is common cause that the respondent fell pregnant but that due to complications with her pregnancy she was bedridden during the period April 2014 to August 2014. The respondent was therefore absent from her practice for approximately 5 months.

[4] During her absence the respondent appointed a so-called manager - a one Mr Edward Ejere ("Ejere") - to assist her in her practice during her absence. Ejere is not an admitted attorney. During this 5 month period Ejere had full access to one of the firm's trust banking accounts.

[5] Upon her return to her office in September 2014, the respondent discovered that irregular payments and withdrawals had been made from her trust banking account. According to the respondent, Ejere had acknowledged to her that he had misappropriated trust funds for personal gain. However, at

[1] Act 53 of 1979.

the time the respondent was unable due to the disarray of her accounting records to advise the Law Society of the exact trust deficit in her bookkeeping but estimated the amount to be in the region of R 900 000.00.

[6] The Law Society appointed Ms Geringer ("Geringer") - a legal official in the employ of the Law Society's Monitoring Unit - to inspect the respondent's accounting records and practice affairs as well as to investigate the complaints submitted to the Law Society.

[7] The respondent informed Geringer that she was under the impression that her accounting records were in order but was unable to provide Geringer with an indication as to the current status of her accounting records.

[8] Geringer reported to the Law Society on 1 June 2015. The following findings are, *inter alia*, recorded in the report:

[8.1] There was a substantial trust deficit in the respondent's trust banking account in the amount of R 1.2 million.

[8.2] The respondent appointed a non-attorney to take control and supervise her practice on her behalf for an extended period of time. During this time the respondent, who was a single practitioner, failed to appoint a practicing attorney to take control of her practice and to exercise proper supervision during her absence. The respondent furthermore placed a non-attorney (Ejere) in a position where he had access to the respondent's trust banking account.

[8.3] Geringer's investigations into the practice's trust account revealed that various amounts held on trust in respect of clients were no longer available in the trust banking account. Trust funds from no less than 7 clients were misappropriated.

[8.4] The accounting records of the respondent were found to be in such disarray that it was difficult to establish whether trust funds were paid in favour of Ejere or whether irregular transfers were made to the respondent's business account or towards the respondent's business expenses as many of the transfers were made randomly and could not be identified.

[8.5] The trust deficit were found to be in the region of R 1 285 788.09. However, due to the unavailability of reliable accounting records, the exact trust position could not be established by Geringer.

[8.6] Various irregular payments (all recorded in Geringer's report) were made from the firms' business banking account. For example, an irregular payment was made to a certain Pose Group and on 8 July 2014 an amount of R23 450.00 was paid to Kerrs Funeral Services which payment was made in respect of Ejere's personal expenses. Ejere also made several unauthorised payments in respect of salaries in August 2014. Geringer recorded that it was apparent to her that several of the transfers made by Ejere from the trust banking account to the business banking account were made randomly.

[8.7] One complaint has been lodged with the Law Society relating to the firms failure to make payment to a client in the amount of R 220 000.00. Two further claims in the amount of R 381 990.06 and R 220 000.00 have been lodged with the Attorneys Fidelity Fund.

[8.8] The respondent remained absent from her practice for a period of five months. During her extended absence the respondent failed to keep proper accounting records in respect of her practice. The accounting records were in such a state of disarray that, at the time of the investigation, the respondent was unable

to advise Geringer in respect of the status of her accounting records. Geringer concluded that the firm's accounting records were so unreliable that she was, as already pointed out, not able to establish what the true trust position was.

[8.9] The respondent attended to the registration and transfers of immovable properties without having being admitted as a conveyancer.

[8.10] Various of the respondent practice's expenses were paid from her trust account. The respondent further effected irregular transfers from her trust account to her business banking account.

[8.11] The respondent admitted that she is unable to rectify the trust deficit in her account.

[8.12] Two claims lodged with the Attorneys Fidelity Fund have been founded on the misappropriation of trust funds.

[8.13] The Law Society have received several serious complaints against the respondent.

[9] The respondent admitted most of these facts. More in particular, she admitted that there was a substantial trust deficit in her firm's bookkeeping; that Ejere had unsupervised access to the firm's trust banking account; that Ejere embezzled substantial amounts of trust funds during the respondent's five months' absence during which Ejere was not supervised; that the respondent was unaware of what the firm's trust position was during her absence and that she failed to keep proper accounting records and that the accounting records were unreliable; and lastly, the respondent admitted that she is not in a position to rectify the trust deficit.

<u>General principles</u>

[10] The principle is trite that the question whether an attorney is a fit and proper person to practice falls in terms of section 22(1) of the Act within the discretion of the court. It also falls within the discretion of the court what an appropriate sanction should be having regard to the totality of facts placed before it.

[11] In deciding matters such as this, the court follows a three staged inquiry:

(i) During the first part of the enquiry the court will decide whether or not the alleged offending conduct has indeed been established on a preponderance of probabilities.

(ii) Secondly, once the court is satisfied that the offending conduct has indeed been established, the court will consider whether, in its discretion, the respondent is a fit and proper person to continue to practice. This process requires a value judgment and requires the court to evaluate and weigh up all the evidence that was placed before it.

(iii) Once both questions have been decided the court will consider what, in its discretion, an appropriate sanction should be. More in particular, the court will consider whether a person should be removed from the roll or whether such a person should merely be suspended from practice for a specified period of time. In considering this question the court will have regard to the nature and gravity of the conduct complained of. As already pointed out, the court will consider all of these factors in their totality and not in isolation.[2]

[12] It is a cornerstone principle of the attorneys' profession that attorneys should at all times keep proper accounting records. This means that an attorney is obliged to keep proper records and books of account in line with generally accepted accounting practices and procedures. More in particular, it is required that an attorney keep full and accurate record of all financial

[2] *Law Society, Northern Provinces v Mogami* 2010 (1) SA 186 (SCA) at paragraph 4.

transactions. In general the courts regard a failure to keep proper accounting records as a serious contravention warranting an order that an attorney be either struck from the role or be suspended. See in this regard: *Cirota And Another v Law Society, Transvaal*:[3]

> "The failure to keep proper books of account as required by s 33 of Act 23 of 1934 is a serious contravention and our Courts have repeatedly warned that an attorney who fails to comply with the section renders himself liable to be struck off the roll or to suspension. (See, in this regard, *Incorporated Law Society v Benade*1956 (3) SA 15 (C) at 17 - 18, *Incorporated Law Society, Transvaal v S*1958 (1) SA 669 (T) at 675; *Incorporated Law society, Transvaal v Goldberg*1964 (4) SA 301 (T) at 303 - 4.) Non-compliance with the rules of the Law Society relating to the proper keeping of books is, in my view, also a serious matter.[4]

See also*: Holmes v Law Society of the Cape of Good Hope and Another Law Society of the Cape of Good Hope v Holmes*[5]

> "[28] The failure to keep proper books is a serious offence. The keeping of proper books underpins the Legislature's endeavours to protect the interests of the public. As succinctly stated by Van Winsen J in *Cape Law Society v Mda* 1971 (2) SA 201 (C) (at 204H):
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> > 'It is not sufficient that trust moneys should not be misappropriated. It is equally necessary that an attorney's dealings with such moneys should be properly recorded. . . . Failing that, much of the machinery provided by the Legislature, eg regs 59 and 60, for the protection of clients, and, indeed, of the Attorneys', Notaries' and Conveyancers' Fidelity Guarantee Fund, is rendered nugatory.'

[3] 1979 (1) SA 172 (A).
[4] At 193E – G.
[5] 2006 (2) SA 139 (C) at 152B – F.

[13] I am in full agreement with the remarks of Trollip, J (as he then was) that 'a contravention of this duty should generally be regarded in a serious light'. Likewise, I wholeheartedly agree with the comments of the same learned Judge in Law *Society, Cape v Marock* (at 206H - 207A) that:

> 'It cannot be sufficiently stressed that a careful adherence to the requirements of the law as to keeping of clients' trust accounts and the proper operation of a trust banking account number amongst the most important of the attorney's duties to his clients. The lack of strict compliance with these rules cannot fail to undermine the confidence of the public in the profession, a situation which, I hardly need stress, ensures to the detriment of all the members of the profession. It is, in my view, the Court's duty to take such action as is necessary to maintain, in full, that confidence and to make its condemnation of a departure from the requirements of the law, both with regard to the administration of a trust banking account and in regard to the proper keeping of trust accounts, plain for all to see.'"

[14] Of specific importance to the present matter is the principle that, although an attorney may delegate some of its accounting functions to staff, it remains nonetheless the duty and responsibility of the attorney to oversee that the work is done properly and with appropriate diligence. Moreover, in the event that it transpires that the accounting tasks were not properly executed, the attorney will ultimately remain answerable if a member of its staff transgresses the law or where it is found that the rules of professional conduct in relation to the attorney's practice were transgressed. An attorney is therefore required to always keep a vigilant eye on trust moneys and ensure that the monies are not used improperly and will ultimately still be liable in the event of a transgression in respect of the duty of care regarding trust monies. See in this regard*: Incorporated Law Society, Transvaal v Visse and Others (1) Incorporated Law Society, Transvaal v Viljoen (2)*:[6]

[6] 1958 (4) SA 115 (T).

> "Where an attorney consents to a partner or a member of his staff dealing with trust moneys, the failure to keep proper books of account becomes all the more reprehensible. It is his duty to keep a vigilant eye on such trust moneys and to see that they are paid into the trust account and not used improperly. He cannot do this without the assistance of proper books of account. In fact, the absence of proper books of account increases the temptation to deal improperly with such trust moneys. If there is a probability that the continued handling of trust moneys by an attorney would be dangerous for his clients and the attorneys' fidelity guarantee fund, the Court should remove him from the roll of attorneys."

[15] It is furthermore trite that it is an important principle that an attorney has an absolute duty towards the preservation of trust funds and that the failure to keep proper books and accounting records is a serious offence. To reiterate what the court said in *Homes*:[7]

> "The keeping of proper books underpins the Legislature's endeavours to protect the interests of the public."

[16] Without repeating the various transgressions, it is clear that the respondent's conduct fell miserably short of what is expected of an attorney. Her conduct was further, in my view reckless to the extreme in failing to supervise her employees; to leave the practice in charge of Ejere who had unsupervised access to the trust bank account over a period of several months; to completely neglect to supervise her bank account and to neglect to ensure that proper accounting records are kept.

[17] It is of concern to the court that the respondent appears to be of the view that she is not to be blamed and that others should be blamed for the misappropriation of trust funds from her trust account. Her denial of any

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[7] *Supra*.

wrong doing is also at odds with what she herself had stated in letters to the Law Society in which she admitted that she acted grossly negligently in allowing Ejere to manage her practice and trust account. In these letters the respondent further specifically accepted responsibility for her actions. The fact that Ejere who is not an attorney was appointed by the respondent to manage her firm is but one factor to be taken into account. The fact that the respondent gave Ejere unsupervised access to her trust account considerably elevates the degree of her negligence as an attorney. Our courts have been consistent in its approach that an attorney should always supervise those entrusted with trust accounts. See *Visse*[8]:

> "It is his duty to keep a vigilant eye on such trust moneys and to see that they are paid into the trust account and not used improperly."

[18] The respondent also blames Ms Coetzee (an attorney) and alleges that she was tasked to supervise the practise. In an affidavit attached to the papers Coetzee denies having been employed by the respondent in any supervisory capacity and states that she was only appointed as an *ad hoc* conveyancer and not as a professional assistant. Coetzee also denies that she was given any authority to operate on the firm's trust account and states that she had no insight into the trust bank statements. No affidavit was filed by the respondent refuting these allegations made by Coetzee.

Conclusion

[19] The court is satisfied that the alleged offending conduct has been established on a preponderance of probabilities. The fact that the respondent admits to most of the offences was also taken into account in coming to a conclusion.

[20] It is clear from the conduct of the respondent and the investigation conducted by Geringer that the respondent has transgressed several of the provisions of the Attorneys' Act and the Law Society's Rules. By

[8] *Supra*.

transgressing the provisions of section 78(4)[9] of the Attorneys' Act the respondent has made herself guilty of unprofessional conduct rendering the practitioner liable to be struck off the role or to be suspended from practice.

[21] In considering an appropriate sanction regard must be had to the seriousness of the transgressions. There is no doubt that the transgressions are extremely serious and that the respondent's negligence had resulted in large amounts of trust funds being misappropriated from her trust account towards her former trust creditors.

[22] As repeatedly pointed out, the law extracts from an attorney the highest possible degree of good faith and it is expected from an attorney to scrupulously observe and comply with the provisions of the Act in respect of all practice related matters and especially pecuniary matters: See: *Society, Transvaal v Matthews*:[10]

> "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 the attorney should at all times have available liquid funds in an 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 *Incorporated Law Society, Transvaal v Visse and Others; Incorporated Law Society, Transvaal v Viljoen* 1958 (4) SA 115 (T) at 118F - H. An

[9] (4) Any practising practitioner shall keep proper accounting records containing particulars and information of any money received, held or paid by him or her for or on account of any person, of any money invested by him or her in a trust savings or other interest-bearing account referred to in subsection (2) or (2A) and of any interest on money so invested which is paid over or credited to him or her."

[10] 1989 (4) SA 389 (T).

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: *Incorporated Law Society, Transvaal v Behrman* 1977 (1) SA 904 (T) at 905H. It is significant that in terms of s 83(13) of the Attorneys Act a practitioner who contravenes the provisions 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."

[23] The respondent has failed miserably in her duty of good faith towards her firm and her clients.

[24] Taking into account all the relevant facts, I am of the view that the respondent has ceased to be a fit and proper person to practice as an attorney and should no longer be allowed to be part of the attorney's profession.

ORDER

In the event the following order is proposed:

1.1 That the name of **MAPHUTI ROSINA KUBYANA** is struck from the roll of attorneys of this Court;

1.2 that the relief set out in Part A paragraphs 1.3 up to and including 1.12 of the order of this Court dated 14 October 2015 will remain in force;

1.3 that the respondent be and is hereby directed:

1.3.1 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 the respondent;

1.3.2 to pay the reasonable fees and expenses of the curator;

1.3.3 to pay the reasonable fees and expenses of any person(s) consulted and/or engaged by the curator as aforesaid;

1.3.4 to pay the expenses relating to the publication of this order or an abbreviated version thereof; and

1.3.5 to pay the costs of this application on an attorney and client scale.

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AC BASSON
JUDGE OF THE HIGH COURT

I agree and it is so ordered

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SS MPHAHLELE
JUDGE OF THE HIGH COURT

Appearances:

For the applicant	:	Mr PJ Smith
Instructed by	:	Rooth & Wessels Inc.
For the Respondent	:	Mr TP Moloto
Instructed by	:	TP Moloto & Co Inc.