

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 4952/2016

6/10/2016

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
28/9/16	
DATE	SIGNATURE

In the matter between:

THE LAW SOCIETY OF THE NORTHERN PROVINCES

APPLICANT

And

DUNCAN NAPE MORIFI

RESPONDENT

Heard:

6 SEPTEMBER 2016

Delivered:

28 SEPTEMBER 2016

JUDGMENT

TWALA AJ

Introduction

- [1] Before this Court, is an application in which the applicant prays for an order suspending the respondent, a member of the applicant, from practising as an attorney of this Court. The applicant further prays for the ancillary relief as set out in the notice of motion.
- [2] At the beginning of the hearing of this case, the respondent, appearing in person, applied from the bar for the postponement of the case. He stated the reason for the application was that he had employed the services of counsel who only informed him on the 2 September 2016, a day or so before the hearing that he is not available to attend Court on the day the matter was set down for. He also could not file his heads of argument because he only learned on the 29 August 2016 that his correspondent in Pretoria had ceased to practice. The other reason for seeking a postponement was that he only received the applicant's heads of argument on the 31 August 2016 after he called their attorneys.

[3] The applicant opposed the respondent's application for postponement for the following reasons:

- (a) the respondent was served with the notice of set down in April 2016 already,
- (b) the respondent has failed to bring a substantive application for a postponement,
- (c) the respondent has failed to furnish the reason for his failure in filing his heads of argument.
- (d) the respondent is an attorney and was therefore in a position to deal with the matter himself.

[4] Realising that he had failed to make out a case for the postponement of the matter the respondent abandoned his application for the postponement of the matter and pronounced himself as being prepared and ready to proceed with the hearing of the case.

Background facts

[5] It is common cause that the respondent was on the 3 February 2009 admitted to practice as an attorney within the jurisdiction of this Court and his name is still on the roll of attorneys. The respondent practised in partnership and for his own account under the name and style of Morifi Seshoka Masho Attorneys at 72A Jorissen Street, corner of Jorissen and Dahi Streets, Polokwane, Limpopo Province.

[6] The applicant is The Law Society of the Northern Provinces incorporated in terms s 56 of the Attorneys' Act 53 of 1979 (the Attorneys' Act). It is common cause that every attorney within the jurisdiction of the applicant is *ipso facto* its member and is governed by its rules.

[7] For the purposes of this judgment the responsibility and the functions of the applicant are the following:

- a. to regulate the exercise of the profession
- b. to encourage and promote efficiency in and responsibility in relation to the profession,
- c. to deal with all matters relating to the interest of the profession and to protect those interests,
- d. to uphold the integrity of practitioners,
- e. to uphold and improve the standards of the professional conduct and qualification of practitioners,
- f. to provide for the effective control of the professional conduct of practitioners,
- g. to exercise disciplinary jurisdiction over all practitioners,

- h. to institute an application for the striking off the roll or suspension from practice in the case where the practitioner is found not to be fit and proper person to continue to practice as an attorney.

The charges against the respondent

[8] The applicant alleges that the respondent committed the following offences as a practising and registered attorney:

- i. he failed to submit his Rule 70 auditor's report for the periods ending 28 February 2011 and 28 February 2012 timeously.
- ii. he failed to submit his rule 70 auditor's report for the periods ending 28th of the one 2013, 28 February 2014 and 28 February 2015 and further reports are currently still outstanding.
- iii. The respondent is practising is an attorney without being in possession of a fidelity fund certificate and has done so since 1 January 2014
- iv. he has failed to keep his accounting records at no place other than his main office.
- v. he abandoned his practice without notifying the applicant.
- vi. he failed to notify the applicant about his whereabouts.

The case of the applicant

[9] The applicant contended that the respondent has conducted himself in a manner that contravened certain rules of the applicant and provisions of the

Attorneys Act. He failed to submit his auditor's report for the periods ending 28 February 2011 and 28 February 2012 respectively to the applicant timeously in terms of the provisions of rules of the applicant. Further, he failed to submit his auditor's report to the applicant for the periods 28 February 2013, 28 February 2014 and 28 February 2015 respectively.

- [10] It is the applicant's contention that the respondent is practising as an attorney without being in possession of a fidelity fund certificate since 1 January 2014. He has previously practised without the fidelity fund certificate for the period between January 2012 to November 2012. He has failed to keep his account records at no place other than his main office. He has abandoned his practice in that he has not informed the applicant of his whereabouts as a result he could not be served with disciplinary processes.

The case of the respondent

- [11] The respondent contended that he practised in partnership with his partners Mashao D and Seshoka TG from 2009 to 2011. He then practised for his own account until November 2011 when he took employment with COGHSTA. He addressed an e-mail to the applicant in 2013 advising them of his new employment and the closure of his practice. He denied being the only one responsible for the submission of the auditor's report for the period 28 February 2011. He denied having practised without the fidelity fund certificate. He denied having a duty to submit his auditor's report for the periods from 28 February 2012, 28 February 2013, 28 February 2014 and February 2015 as he was no

longer practising as an attorney but was in the employ of COGHSTA. When he closed his practice, he did not have any trust creditors as there were no funds in the trust account.

[12] Initially the respondent in his submission sought to project a picture that he was never informed about the audit which was conducted on his practice by the applicant. This included the contention that he never had any engagement about the audit with the applicant's auditor, Ms Mapfumo. However, during the debate with the court he conceded that he spoke to Ms Mapfumo on the telephone but never met her in person regarding the audit.

[13] The other important concession which the respondent made in the context of this judgment is that he in fact did not pay much attention to the provisions of the Attorneys Act and the Rules of the applicant. He conceded that he had administration problems and that he had made mistakes by not informing the applicant that he was closing his practice and submitting a final closing audit of his trust account.

[14] The respondent requested the Court to be lenient with him when it imposes the sanction. He submitted that the sanction should have corrective measures, which could include subjecting him to further training. He also indicated that his current employment is linked to him being an attorney and therefore if he was to be suspended he could lose his current employment.

[15] The issue to be determined in this case is whether the respondent has contravened the rules of the applicant and the provisions of the Attorneys Act. If it is found that he has committed those transgressions, then the enquiry is to determine whether such conduct can be said to be unprofessional, dishonourable and unworthy for an attorney to warrant his suspension from practising as such.

[16] An application of this nature to the Court takes the form of a disciplinary inquiry and is thus *sui generis* in nature and not a *lis* between the Law Society (the applicant) and the practitioner (the respondent). The Law Society as the *custos morum* place the facts before the Court for consideration to determine whether a contravention or an offence has been committed by an attorney. The applicant has the duty to show that an offence or contravention of the rules have been committed on the balance of probabilities.¹

[17] Due to the nature of the disciplinary proceedings, it is essential for the respondent to co-operate and to place the full facts, where necessary, before the Court to enable it to arrive at the correct decision. The respondent is not expected to be obstructive and to submit bare denials.

¹ See *Prokureursorde v Kleynhans* 1995 (1) SA 839 (T).

[18] As indicated above, the respondent has admitted to his wrong doing in that it contravened the rules of the applicant and the provisions of the Attorneys Act. Although it was late in the day that the respondent conceded that it did not unscrupulously observe the rules of the applicant and the provisions of the Attorneys Act, the respondent did put facts before this Court to enable it to come to the correct conclusion.

[19] The failure to submit the yearly audit report to the applicant is a serious transgression because it is the only mechanism with which the applicant can ascertain that the trust funds of the public held by an attorney are protected. Therefore the conduct of the respondent is under the circumstances unprofessional, dishonourable and unworthy of an attorney. It is therefore clear that the respondent is no longer a fit and proper person to continue to practice as an attorney of this Court for his own account.

[20] It is my considered view that a proper case has been made out in the papers and has been confirmed by the respondent himself when he admitted to transgressions of the rules and the provisions of the Attorneys Act.

[21] I accordingly find the respondent to be guilty for not submitting his closing audit report in February 2012.

[22] The Court accepts that the respondent is in full time employment of COGHSTA since November 2011. It is my view therefore that the public and the fidelity fund are not exposed since the respondent is not practising on his own account. I therefore do not agree with counsel for the applicant that the sanction to be imposed under the circumstances of this case should be the striking of the name of the respondent from the roll of attorneys of this Court. Moreover, the striking of the name of the respondent from the roll will result in him losing his current employment.

[23] It is my respectful view that, although the transgressions the respondent has been found guilty of are serious, the respondent is now employed in another capacity. He is not practising on his own account and therefore the general public and the fidelity fund are not exposed. He is not handling trust funds in the course of his current employment.

[24] In considering the sanction imposed below, I have taken into account the submissions made by the respondent in mitigation of the sanction. I have not been persuaded that the mitigation outweigh the gravity of the offence. In mitigation the respondent sought to show some remorse. This was however belatedly done. I have also in particular taken into account the attitude and the approach that had been adopted by the respondent.

[25] In the circumstances, I propose the following order:

1. The respondent is suspended from practising as an attorney of this Court for his own account or in partnership or as director of an incorporated practice, on the following conditions:
 - A. That the respondent complies with all the Law Society of the Northern Provinces' (the applicant) outstanding requirements;
 - B. That the respondent attend and complete the Legal Practice Management Course as prescribed in Section 13B of the Attorneys' Act, Act 53 of 1979, read with Rule 21.16 of the Rules for the Attorneys' Profession;
 - C. That the respondent be prohibited from handling or operating on or being in any way involved in any trust accounts at any practice where he may be employed during his period of suspension;
2. That respondent be prohibited from handling or operating on his trust accounts as detailed in paragraph 3 hereof.
3. That Johan van Staden, the head: members affairs of applicant or any person nominated by him, be appointed as *curator bonis* (curator) to administer and control the trust accounts of respondent, including accounts relating to insolvent and deceased estates and any deceased estate under curatorship connected with respondent's practice as an attorney and including, also, the separate banking accounts opened and

kept by respondent at a bank in the Republic of South Africa in terms of section 78(1) of Act 53 of 1979 and/or any separate savings or interest-bearing account as contemplated by section 78(2) and/or section 78(2A) of Act No. 53 of 1979, in which monies from such trust banking accounts have been invested by virtue of the provisions of the said sub-section or in which monies in any manner have been deposited or credited (the said accounts being hereafter referred to as the trust accounts), with the following powers and duties:

- 3.1 immediately to take possession of respondent's accounting records, records, files, and documents as referred to in paragraph 6 and subject to the approval of the board of control of the attorneys' fidelity fund (hereinafter referred to as the fund) to sign all forms and generally to operate upon the trust account(s), but only to such extent and for such purpose as may be necessary to bring to completion current transactions in which respondent was acting at the date of this order.
- 3.2 subject to the approval and control of the board of control of the fund and where monies had been paid incorrectly and unlawfully from the undermentioned trust accounts, to recover and receive and if necessary in the interest of persons having lawful claims upon the trust account(s) and/or against respondent in respect of monies held, received and/or invested by respondent in terms of section 78(1)

and/or section 78(2) and/or section 78(2A) of Act 53 of 1979 (hereinafter referred to as trust monies), to take any legal proceedings which may be necessary for the recovery of money which may be due to such person in respect of incomplete transactions, if any, in which respondent was and may still have been concerned and to receive such monies and to pay the to the credit of the trust account(s).

- 3.3 to ascertain from respondent's accounting records the names of all persons on whose account respondent appears to hold or to have received trust monies (hereinafter referred to as trust creditors); to call upon respondent to furnish him, within 30 (thirty) days of the date of service of this order or such further period as he may agree to in writing, with the names, addresses and amounts due to all trust creditors;
- 3.4 to call upon such trust creditors to furnish such proof, information and/or affidavits as he may require to enable him, acting in consultation with, and subject to the requirements of, the board of control of the fund, to determine whether any such trust creditor has a claim in respect of monies in the trust account(s) of respondent and, if so, the amount of such claim;
- 3.5 to admit or reject, in whole or in part, subject to the approval of the board of control of the fund, the claims of any such trust creditor or

creditors, without prejudice to such trust creditor's right of access to the civil courts;

- 3.6 having determined the amounts which he considers are lawfully due to trust creditors, to pay such claims in full but subject always to the approval of the board of control of the fund;
- 3.7 in the event of there being any surplus in the trust account(s) of the respondent after payment of the admitted claims of all trust creditors in full, to utilise such surplus to settle or reduce (as the case may be), firstly, any claim of the fund in terms of section 78(3) of Act No 53 of 1979 in respect of any interest therein referred to and, secondly, without prejudice to the rights of the creditors of respondent, the costs, fees and expenses referred to in paragraph 10 of this order, or such portion thereof as has not already been separately paid by respondent to applicant, and, if there is any balance left after payment in full of all such claims, costs, fees and expenses, to pay such balance subject to the approval of the board of control of the fund, to respondent, if he is solvent, or, if respondent is insolvent, to the trustee(s) of respondent's insolvent estate;
- 3.8 in the event of there being insufficient trust monies in the trust banking account(s) of the respondent, in accordance with the available documentation and information, to pay in full the claims of trust creditors who have lodged claims for repayment and whose claims have been approved, to distribute the credit balance(s) which

may be available in the trust banking account(s) amongst the trust creditors alternatively to pay the balance to the Attorneys Fidelity Fund;

3.9 subject to the approval of the chairman of the board of control of the fund, to appoint nominees or representatives and/or consult with and/or engage the services of attorneys, counsel, accounts and/or any other persons, where considered necessary, to assist him in carrying out his duties as curator; and

3.10 to render from time to time, as curator, returns to the board of control of the fund showing how the trust account(s) of respondent has/have been dealt with, until such time as the board notifies him that he may regard his duties as curator as terminated.

4. That respondent immediately delivers his account records, records, files and documents containing particulars and information relating to:

4.1 any monies received, held or paid by respondent for or on account of any person while practising as an attorney;

4.2 any monies invested by respondent in terms of section 78(2) and/or section 78(2A) of Act No 53 of 1979;

4.3 any interest on monies so invested which was paid over or credited to respondent;

- 4.4 any estate of a deceased person or an insolvent estate or an estate under curatorship administered by respondent, whether as executor or trustee or curator or on behalf of the executor trustee or curator;
- 4.5 any insolvent estate administered by respondent as trustee or on behalf of the trustee in terms of the Insolvency Act, No 24 of 1936;
- 4.6 any trust administered by respondent as trustee or on behalf of the trustee in terms of the Trust Properties Control Act, No 57 of 1988;
- 4.7 any company liquidated in terms of the Companies Act, No 61 of 1973, administered by respondent as or on behalf of the liquidator;
- 4.8 any close corporation liquidated in terms of the Close Corporations Act, 69 of 1984, administered by respondent as or on behalf of the liquidator; and
- 4.9 respondent's practice as an attorney of this Court, to the curator appointed in terms of paragraph 5 hereof, provided that, as far as such accounting records, records, files and documents are concerned, respondent shall be entitled to have reasonable access to them but always subject to the supervision of such curator or his nominee.

- 5. That should respondent fail to comply with the provisions of the preceding paragraph of this order on service thereof upon him or after a return by the person entrusted with the service thereof that he has been unable to effect service thereof on respondent (as the case may be), the sheriff for the

district in which such accounting records, records, files and documents are, be empowered and directed to search for and to take possession thereof wherever they may be and to deliver them to such curator.

6. That the curator shall be entitled to:

6.1 hand over to the persons entitled thereto all such records, files, and documents provided that a satisfactory written undertaking has been received from such persons to pay any amount, either determined on taxation or by agreement, in respect of fees and disbursements due to the firm;

6.2 require from the persons referred to in paragraph 8.1 to provide any such documentation or information which he may consider relevant in respect of a claim or possible or anticipated claim, against him and/or respondent and/or respondent's clients and/or fund in respect of money and/or other property entrusted to respondent provided that any person entitled thereto and shall be permitted to make copies thereof;

6.3 publish this order or an abridged version thereof in any newspaper he considers appropriate; and

6.4 wind-up of the respondent's practice.

7. That respondent be and is hereby removed from office as –

7.1 executor of any estate of which respondent has been appointed in terms of section 54(1)(a)(v) of the Administration of Estates Act, No 66 of 1965 or the estate of any other person referred to in section 72(1);

7.2 curator or guardian of any minor or other person's property in terms of section 72(1) read with section 54(1)(a)(v) and section 85 of the Administration of Estates Act, No 66 of 1965;

7.3 trustee of any insolvent estate in terms of section 59 of the Insolvency Act, No 24 of 1936;

7.4 liquidator of any company in terms of section 379(2) read with 379(e) of the Companies Act, No 61 of 1973;

7.5 trustee of any trust in terms of section 20(1) of the Trust Property Control Act, No 57 of 1988;

7.6 liquidator of any close corporation appointed in terms of section 74 of the Close Corporations Act, No 69 of 1984; and

7.7 administrator appointed in terms of section 74 of the Magistrates Court Act, No 32 of 1944.

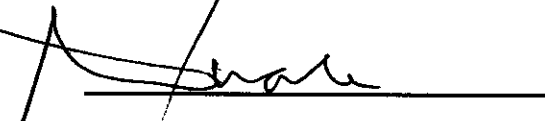
8. That respondent be and is hereby directed:

8.1 to pay, in terms of section 78(5) of Act No. 53 of 1979, the reasonable costs of the inspection of the account records of respondent;

8.2 to pay the reasonable fees of the auditor engaged by applicant;

- 8.3 to pay the reasonable fees and expenses of the curator, including travelling time;
 - 8.4 to pay the reasonable fees and expenses of any person(s) consulted and/or engaged by the curator as aforesaid;
 - 8.5 to pay the expenses relating to the publication of this order or an abbreviated version thereof; and
 - 8.6 to pay the costs of this application on an attorney and client scale.
9. That if there are any trust funds available the respondent shall within 6 (six) months after having been requested to do so by the curator, or within such longer period as the curator may agree to in writing, shall satisfy the curator, by means of the submission of taxed bills of costs or otherwise, of the amount of the fees and disbursements due to him (respondent) in respect of his former practice, and should he fail to do so, he shall not be entitled to recover such fees and disbursements from the curator without prejudice, however, to such rights (if any) as he may have against the trust creditor(s) concerned for payment or recovery thereof;
10. That a certificate issued by a director of the Attorneys Fidelity Fund shall constitute *prima facie* proof of the curator's costs and that the Registrar be authorised to issue a writ of execution on the strength of such certificate in order to collect the curator's costs.

11. That the respondent prove to this Court that he is a fit and proper person to practice as an attorney for his own account before the suspension imposed in paragraph 1 of this order is uplifted.


TWALA M

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

I agree


MOLAHLEHI E

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Appearances:

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