REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE No: 84434/2016

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

SIGNATURE 15/10/19 DATE

In the matter between:

The Law Society of the Northern Provinces Applicant

and

Ellahm Sentso Respondent

JUDGMENT

MKHAWANE, AJ:

Introduction

[1] The applicant, the Law Society of the Northern Provinces, brought an application in terms of section 22(1)(d) of the Attorneys Act 53 of 1979 for the suspension of the respondent, Ellahm Sentso, from practising as an attorney of this court on such conditions as the Court may deem appropriate, alternatively the striking of the name of the respondent from the roll of attorneys.

[2] The respondent was admitted as an attorney of this Honourable Court on 26 September 2008 and her name still appears on the roll of attorneys. She is a single practitioner under the style of Ellahm Sentso Attorneys, in Johannesburg.

[3] In terms of S22(1)(d) of the Attorneys Act, an attorney may on application by the society concerned be struck off the roll or suspended from practice by the court within the jurisdiction of which he (or she) practices.

> *"(a) if he (or she), in the discretion of the court, is not a fit and proper person to continue to practise as an attorney."*

[4] The nature of the inquiry, namely a determination of the question whether an attorney concerned is not a fit and proper person to continue to practise and how a court should exercise its discretion in this regard, including the issue of appropriate sanction in was decided in *Jassat v Natal Law Society* 2000(3) SA 44 SCA. It was stated that section 22(1)(d) contemplates a three stage inquiry:

First, the court must decide whether the alleged offending conduct has been established on a preponderance of probabilities, which is a factual inquiry.

Second, it must consider whether the person concerned in the discretion of the court is not a fit and proper person to continue to practice. This involves a weighing up of

the conduct complained of against the conduct expected of an attorney and, to this extent, is a value judgment.

And third, the court must inquire whether in all circumstances the person in question is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice.

[5] The third leg is a matter of discretion of the court. The question whether a court will adopt one course or the other depends upon such factors as the nature of the conduct complained of, the extent to which it reflects upon the person's character or shows him to be unworthy to remain in the ranks of an honourable profession, the likelihood or otherwise of a repetition of such conduct and the need to protect the public. Ultimately it is a question of degree.

[6] In deciding whether an attorney ought to be removed from the roll or suspended from practice, the Court is not first and foremost imposing a penalty. The main consideration is the protection of the public.

[7] It was stated in *Malan and Another v Law Society*, Northern Provinces 2009(1) SA 216 SCA at par 8 that logic dictates that if a court finds that an attorney is not a fit and proper person to continue to practise as an attorney, the attorney must be removed from the roll. If the Court, however have grounds to assume that after a period of suspension, the attorney will be fit to practise as an attorney in the ordinary course of events it would not remove the attorney from the roll but order an appropriate suspension.

[8] The proceedings before us began with the respondent's application for condonation to file a further opposing affidavit, dated the 13th August 2019. In the affidavit in support of the condonation the respondent explains that annexure R3 attached to the affidavit, being a certificate confirming that she has since completed the Practice Management training course, was not attached by her erstwhile attorney, Rontgen.

[9] She states that she only realised when she was consulting with her counsel that this essential document had been omitted.

[10] The respondent submitted that since she has given an explanation and that the reasons for the delay are reasonable the inclusion of the certificate will bolster her case significantly.

[11] She further submitted that her prospects of success in the matter have increased substantially.

[12] It is well-known that condonation of the kind sought here will be granted if there is a full and proper explanation for the delay, and if the prospects of success are good. (*Uitenhage Transitional Local Council v SARS*, 2004(1) SA 292 SCA.

[13] In *casu*, the affidavit supporting the application for condonation sets out in appropriate detail the reasons for the delay, which reasons are in my view, acceptable and reasonable.

[14] However, as regard to the respondent's prospects of success, this aspect can only be considered once the merits of the matter have been fully ventilated. The

decision for condonation is therefore deferred until the merits of the matter have been dealt with below.

[15] I must pause to mention that the fact that the respondent has since completed the Practice Management Training Course, required for her to obtain to obtain her fidelity fund certificate but that has no impact of the charges she is facing as will appear below.

[16] The respondent further sought to raise points of law and we had to stand down the matter for two days to allow the applicant to consider the points of law sought to be raised by the respondent.

[17] The first point raised was that relief sought by the applicant/Law Society other than suspension, would be *ultra vires* the resolution of the applicant and accordingly not competent. The resolution by the Council for the applicant was that applicant, be instructed to apply to Court for the suspension of the respondent.

[18] The respondent submitted that the resolution did not include the application for striking off.

[19] This argument seems to me, sight was lost of the matter of *the Law Society of the Northern Provinces v Soller* 2015 JDR 0339 GP, where it was held by Bertelsmann and I de Villiers JJ at page 8 that the respondent in that matter had no right to insists upon a disciplinary inquiry being held prior to steps being taken for his removal from the roll. In fact this court could *mero motu* initiate steps to strike the respondent's name from the Roll of Attorneys and could do so, albeit notionally, even without reliance on the Law Society's co-operation or indeed even against its wish.

[20] In the case of the *Law Society of the Northern Provinces v Le Roux* 2012 (4) SA 500 GNP the court on its own initiative considered an order striking off the offending practitioner. In that matter the applicant had only brought an application for suspension only against the background of gravity of the Mr Le Roux's conduct.

[21] It must be remembered that in matters of this nature the applicant itself features in the proceedings as an applicant without being a party to those proceedings. As *custos morum* of the profession it brings offending behaviour to the court's attention. The court conducts an inquiry into the behaviour of its officer's fitness to remain on the roll of practitioners.

[22] The Court stated that in principle, nothing prevents the court from initiating the inquiry into an errant attorney's conduct itself if it comes to the Court's notice in whatever fashion.

[23] Therefore this argument by the respondent should fail.

[24] The second point raised by the respondent was that relief sought by the applicant that the respondent be compelled to deliver documents and records is contrary to the spirit, purport and objects of the Bill of Rights in that the respondent is granted no protection against the right of self-incrimination.

[25] This argument is moot in that this court, on 11 August 2015, already granted an order in terms of which, inter alia, the respondent was suspended and Mr Johan van Staden was appointed as a *curator bonis*. Therefore this argument by the respondent must also fail.

[26] The offending conduct which prompted the Law Society to bring the application appear from the founding affidavit deposed to by its president Anthony Peter Millar which include the following:

> *"9.1 The respondent is practising as an attorney without a fidelity fund certificate and that she had done so since 1 January 2012;*
>
> *9.2 the respondent failed to attend a mandatory legal practice management course and to submit a practice management certificate to the Law Society;*
>
> *9.3 the respondent failed to comply with section 13B of the Attorney's Act and persisted in her failure;*
>
> *9.4 the respondent failed to account to clients;*
>
> *9.5 the respondent delayed the payment of trust funds;*
>
> *9.6 the respondent possibly misappropriated trust funds;*
>
> *9.7 the respondent failed to co-operate with the Law Society, a contravention of Rule 89.25;*
>
> *9.8 the respondent failed to give proper attention to instructions of her clients, a contravention of Rule 89.15 and alternatively Rule 89.32;*
>
> *9.9 and the respondent failed to reply to the correspondence addressed to her by the Law Society."*

[27] The Law Society also received two complaints against the respondent as at the time of the finalization of the founding affidavit.

[28] The respondent opened her practice on 1 January 2010. She was issued with a fidelity fund certificate for 2011. She was obliged to attend the prescribed legal practice management course and to submit a practice management certificate to the Law Society on or before 31 December 2011. She failed to do so and therefore could not be issued with another fidelity fund certificate.

[29] Nevertheless, the respondent continued to practise as an attorney without a fidelity fund certificate from 1 January 2012 until her suspension from practice. She did so despite repeated warnings issued to her by the Law Society that her conduct in doing so was contrary to the provisions of the peremptory requirement of section 41(1) and that her conduct constituted an offence in terms of section 83(10). The respondent failed to reply to the applicant's letters.

[30] In terms of section 13B of the Attorneys Act;

> *"Certain Attorneys to complete training in legal practice management*
>
> *(1) After commencement of section 6 of the Judicial Matters Amendment Act, 2005 and subject to sub-section (2); every attorney who, for the first time, is required to apply for a fidelity fund certificate in terms of section 42 must –*
>
> *(a) within the period contemplated in section 74(1) (dA); and*
>
> *(b) after payment of the fee prescribed in terms of section 80(i) complete a legal practice management course approved by and to the satisfaction of the council of the province in which he or she intends to practise."*

[31] The respondent, in her answering affidavit, did not deny that she practised without a fidelity fund certificate. She maintained that the reason why she practiced without a fidelity fund certificate was because the Law Society condoned it for its own benefit and that it was within the Law society's "*implied consent*".

[32] The respondent completed the legal practice management course and was issued with the certificate on the 23rd November 2018. However, this does not change the charges she is facing.

[33] There were two complaints received by the Law Society details of which follow herein. In terms of these complaints made to the applicant, the respondent failed to account to the complainants.

Mokhosi complaint

[34] The Wits Law Clinic submitted a complaint to the applicant on behalf of Ms Mokhosi during April 2016. The latter had concluded an agreement for the purchase of an immovable property with Mr Montwa. The sale price was R45 000 of which Ms Mokgosi had already paid R20 000 to the seller during June 2011. Ms Mokgosi and Mr Montwa thereafter approached the respondent to assist them with the registration of the property into the name of Mokhosi.

[35] The respondent drew up a sale agreement and requested payment from Ms Mokgosi a payment of R6850.00 for services rendered. Ms Mokgosi paid this amount on 17 August 2011. She also paid the balance of purchase price into the respondent's trust account during 22 August 2011 to 28 August 2012.

[36] Despite the payments no attempt was made by the respondent to communicate with Ms Mokhosi and until the date of the launch of the application, almost 5 years after the payments, the property, has still not been transferred into Ms Mokhosi's name.

[37] Ms Mokhosi approached the Wits Law Clinic for assistance and to make enquiries regarding the transfer of the property, alternatively the reasons for the delay in effecting the transfer.

[38] The Wits Law Clinic addressed two letters to the respondent requesting an explanation. The respondent failed to respond to both letters.

[39] The Wits Law Clinic then submitted a complaint to the applicant on behalf of Ms Mokgosi. On the 5th October 2016 the applicant referred the complaint to the respondent for comment. The respondent failed to respond to the applicant.

[40] However, in her answering affidavit, the respondent, responding in a dismissive manner merely alleging that she had accounted to Ms Mokgosi "*telephonically and in writing*", that she requested the seller to provide her with a letter of authority, that her failure to respond to the complaint when it was referred to her was due to her "*being sick*"; and that she has responded to Mokhosi.

[41] In her answering affidavit she attached an affidavit deposed to by the seller. Attached to this affidavit were two letters addressed to Mokgosi dated the 23 January 2014 and 1 July 2016, wherein she reports on the reasons for being unable to effect the transfer of the property. The fax transmission reports of these letters indicate that both letters were actually transmitted on the 1st December 2016, this 2

weeks after the application was launched by the applicant. This discrepancy was not explained by the respondent. The only conclusion is that she did so to mislead this court.

[42] In the aforesaid affidavit of the seller, the seller confirms that the respondent effected payment of the balance of the purchase price in the amount of R25 000 to him without providing details of when such a payment was made. This payment was allegedly made on the basis of an informal agreement prior to the written agreement according to the respondent's supplementary affidavit. This is not corroborated by the parties to the agreement.

[43] The respondent states that she failed to respond to the Law Society's letter referring the complaint to her because she was ill. She attached a letter addressed to the Law Society dated the 9th September 2016 as well as a note from Helen Joseph hospital dated 5 September 2016. However, the letter made no reference to the complaint and furthermore the complaint from Mokhosi was only referred to the respondent on the 5th October 2016, thus a month after the date of the sick note and after her recovery from illness.

[44] The respondent, in her supplementary affidavit stated that the reason for her failure to respond to this complaint from the Law Society was because she was told not to operate or practice without a fidelity certificate. She does not deal with the discrepancies in her conflicting versions as to why she did not respond to the complaint. More worrying is her conduct of lying under oath in these proceedings.

Mofiko complaint

[45] The applicant also received a complaint from Wits Law Clinic lodged on behalf of Ms Mofiko. According to this complaint, Ms Mofiko instructed the respondent during May 2014 to assist her in the sale of an immovable property inherited from her late mother.

[46] An agreement of sale was concluded and the purchaser deposited the purchase price in an amount of R180 000 into the respondent's trust banking account by 8 September 2014. The respondent paid an amount of R43 0000 from the proceedings of the sale to Mofiko retaining the balance of R137 000.00

[47] According to the complaint neither Mofiko nor the buyer were requested by the respondent to sign any further documents to effect transfer. Furthermore the respondent failed to respond to Mofiko. Mofiko wanted the respondent to pay her the balance of the purchase price. According to the applicant the possibility of misappropriation of the funds could not be excluded.

[48] At the time when the complaint was lodged Mofiko also wanted information pertaining to the administration of her late brother's estate.

[49] The respondent responded to this complaint in a dismissive manner stating that she accounted to her telephonically and in writing. She attached an affidavit from Mofiko with a letter purporting to report back to Mofiko but failed to address the concerns raised by Mofiko especially regarding her failure to account to her in respect of trust funds.

[50] The respondent in her answering affidavit denied that she failed to account to Mofiko in respect of trust funds. However, she failed to provide facts, information or

documentation to substantiate her denial. She could have just provided this court with, for instance, a copy of statement she rendered to Mofiko; demonstrated that trust funds have been accounted for fully; and provided proof that the trust moneys were available all the time to meet trust liabilities.

[51] In her supplementary answering affidavit she indicated that R43 000 was paid to Mofiko from her personal funds and by cheque contrary to her earlier indication that the payment was made in cash. She also maintained that Mofiko funds remain in her trust bank account and annexed a statement indicating a balance of R276 037.85 as at June 2017.

[52] However, her audit report for the period ending 29 February 2016, the available trust funds are recorded as R118 339.47 against a trust liability of R108 674.44, thus a trust surplus of R9665.03. If one accepts that R43 000 had been paid to Mofiko, the trust funds belonging to her ought to be R137 000 which exceeds both amounts. That means that the respondent held insufficient funds to satisfy her trust liability to Mofiko alone.

[53] This therefore brings into question the integrity the respondent's accounting records. How was this shortfall missed?

[54] On the basis of all the evidence brought before us I am satisfied that it has been proven and I find as such that the respondent has contravened all the provisions of the sections and the rules referred to by the applicant above.

Fit and proper person

[55] The respondent did not fully co-operate with the applicant, failed to convincingly respond to the allegations against her. She blamed illness even in circumstances where her failure to act occurred, according to her own version a substantial period of time after her attendance at hospital and subsequent recovery. This shows dishonesty. I am of the view that this displayed lack of integrity on her part.

[56] She failed to account and respond satisfactorily to the shortfall in the trust account, maintaining that Mofiko trust funds were in her trust account when clearly her own evidence showed otherwise. This, on its own constitutes a breach of the most fundamental rule, that the total amount in an attorney's trust account must at all times be sufficient to cover the amounts owing to trust creditors. This has not been explained by the respondent at all.

[57] She practiced as an attorney without a fidelity fund certificate which constitutes a serious offence in terms of section 83(10). Although, in *Law Society, Northern Provinces v Mogami and Others* 2010(1) SA 186 SCA the Appeal Court held that practising without a fidelity certificate is a serious misconduct but not bad enough to merit removal from the roll, the court must not look at each issue in isolation.

[58] She accused the Law Society and its officers of abusing its powers; that it has convened its own meetings without giving her the right to a hearing and concluded that she had stolen money, accusing the applicant's officers of creating charges against her.

[59] Taking all the above, I am satisfied that the respondent is not a fit and proper person to remain on the roll of attorneys.

Sanction

[60] It is trite that applications to court for the striking off of the names of attorneys from the roll of attorneys are not ordinary civil proceedings. They are proceedings of disciplinary nature and sui generis. (*Solomon v Law Society of Good Hope* 1934 AD 401 at 408 and *Hassim v Incorporated Law Society of Natal* 1977(2) SA 757 (A) at 767-8.

[61] The real issue is whether the practitioner concerned has been guilty of unprofessional conduct or dishonouring or unworthy conduct and is therefore unfit to continue to practice as an attorney. This is a value judgment. In answering that this question sight should not be lost of the reality that, in its effect, the imposition of striking off constitutes a severe penalty and that means that for such an attorney to be re-admitted will have to show clearest proof that he/she has genuinely reformed, that a considerable period has elapsed since the struck off and that the probability is that, if reinstated he or she will conduct himself/herself honestly and honourably in the future (*Law Society of the Cape of Good Hope v C* 1986(1) SA 616).

[62] In deciding which course to follow the two considerations are to discipline and punish errant attorneys and to protect the public particular where trust funds are involved. (*Summerly v Law Society, Northern Provinces* 2006(5) SA 613 SCA – paragraph 19.

[63] In Jasat, it was stated that one has to look at the nature of conduct complained of, the extent to which it reflects upon the person's character or shows him or her to be unworthy person to remain in the ranks of the honourable profession, the likelihood or otherwise of a repetition of such conduct.

[64] It has been stated in Malan that an attorney who is the subject of a striking-off application and who wishes a court to consider a lesser option, ought to place the court in the position of formulating appropriate conditions of suspension.

[65] The conduct of the respondent is serious, viewed cumulatively, warrants an order striking her name from the roll of attorney. The continued denial by the respondent of any misconduct reveals a lack of appreciation of her own conduct demonstrating that after a period of suspension, it cannot be assumed that if she was to be suspended she would be reformed. A person who acknowledges or appreciates her misconduct is likely to reform her ways and be fit and proper to practice as an attorney.

[66] Her conduct coupled with her failure to provide exceptional circumstances to justify a lesser penalty left me with no other alternative but to hold that the only suitable sanction is the removal of her name from the roll of attorneys.

Costs

[67] It is trite that the applicant bring the application as the customs *morum* of the attorney's profession. It has a statutory duty to approach the court in circumstances where an attorney has failed to comply with his or her lawful obligations.

[68] In the circumstances it should be fully indemnified for its costs. The general rule is that it is entitled to its costs and usually on an attorney and client scale. I have not found any reason to deviate from this general rule.

Accordingly I make the following order:

1. The name of Ellahm Sentso is struck off the roll of attorneys of this Honourable Court.

2. The respondent shall surrender and deliver her certificate of enrolment as an attorney to the Registrar of this Honourable Court.

3. In the event of the respondent failing to comply with the terms of this order, within 14 days the sheriff of the district in which the certificate is, is authorized and directed to take possession of the certificate and deliver it to the Registrar of this Honourable Court.

4. The respondent is interdicted and prohibited from handling or operating on her trust accounts.

5. The appointment of the Curator in terms of a court order dated 11 August 2017 remain.

6. The respondent to pay the costs on attorney client scale.

H E Mkhawane
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree,

N M Mavundla
JUDGE OF THE HIGH COURT
GAUTENG L DIVISION, PRETORIA

Date of hearing:	15 August 2019
Judgment delivered:	
Attorney for the appellant:	L Groome
Instructed by:	Rooth and Wessels
Counsel for the respondent:	C Snoyman
Instructed by:	Ellahm Sentso Attorneys